(1)

Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

JOHN S. RENDALL, *Pro Se, Petitioner*

v.

ALFONSO L. SEDITA, on behalf of himself and all others similarly situated, JOSEPH B. GROSSMAN, STEPHEN DISCH, LYNN BOYER, ALBERT HALEGUOA, ERIK BAUM, PETER J. FOURNIER, KEVIN J. GURL, ZOE GRAVES, *Respondents.*

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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86 pp

QUESTIONS PRESENTED FOR REVIEW

Over 8,000 putative class members were deprived of their constitutional "due process" rights, Fed. R. Civ. P. Rule 23(c)(2) and in the Act of Congress PSLRA 95 for reduction of abusive litigation and coercive settlements.

FIRST.
Does the express language and intent of Fed. R. Civ. P. Rule 23(c)(2) leave no doubt that individual notice must be sent to all class members who can be identified through reasonable effort in a class action maintained under rule 23(b)(3) and whether the trial court's dismissal of this class action without prejudice under Rule 41(a)(2) violated Rules 23(c)(2) and 23(e) prejudicing the rights and the claims of all parties?

SECOND.
Does the express language and intent of the US Congress in the Private Securities Litigation Reform Act of 95 to reduce abusive litigation and coercive settlements mandate "final adjudication" to deter abusive litigation and coercive settlements and was the trial court without authorities to override the US Congress in dismissing this class action without prejudice under Fed. R. Civ. P. Rule 41(a)(2)? 15 U.S.C.A. § 77z-1(a)(a)(c).

THIRD.
Did the trial court have the authority in class actions maintained under Fed. R. Civ. P. Rule 23(b)(3) to conduct "mini-trials" on claims without first noticing all class members who could be reasonably identified under Rule 23(c)(2), and was the trial court in this class action under Rule 23(b)(3) without authority in conducting such mini-trials with findings of fact and conclusions of law to support a dismissal without prejudice of all claims under Rule 41(a)(2)?
Eisen v. Carlisle & Jacqueline, et al., 417 US 157, 158.

FOURTH.
Did public interest require the due process of law in claims in order to protect US consumers of Canadian energy from the

liability of the disastrous environmental consequences of Big Oil's Canadian operations threat to the Artic?

FIFTH.
Did public interest require the due process of law in claims of a cover-up by abusive lawsuits, unlawful restraint of clean technology (anti-trust), and questionable regulatory action/inaction (SEC and Nasdaq)?
Poller v. Columbia Broadcasting, 368 US 464, 473 (1962).

PARTIES TO THE PROCEEDINGS

"Petitioner"

John S. Rendall, *Pro Se*

"Respondents"

Alfonso L. Sedita, on behalf of himself and all others similarly situated, Joseph B. Grossman, Stephan Disch, Lynn Boyer, Albert Haleguoa, Erik Baum, Peter J. Fournier, Kevin J. Gurl, and Zoe Graves

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Deutsche Morgan Grenfell, Inc., Charles Maxwell, Solv-Ex Corporation

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W. Jack Butler

Herbert M. Campbell, III

Requests for Amicus Curiae, Appendix D1-7, support for "Petition of a Writ of Certiorari" from the Solicitor General of the United States, the Securities and Exchange Commission and the Attorney General of the State of New York are submitted and replies are awaited. Appendix B, findings 13, 19, and 25.

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In re Solv-Ex Corporation Securities Litigation
198 F.Supp. 2d 587 (S.D.N.Y. 2002).

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Rendall's letters requesting support amices curiae on behalf of the President of the United States, the Solicitor General of the United States, the Attorney General of New York, the Secretary of Energy, the Securities and Exchange Commission, the House of Representatives, and the United States Senate to help this Court's review for public interest in Rendall's claims. *See* Appendix B, findings 13, 19, and 25, and as per Supreme Court Rule 29.4:

1. The President of the United States
2. The Solicitor General of the United States
3. The Attorney General of New York
4. The Secretary of Energy
5. The Securities Exchange Commission Chairman
6. The House of Representatives - The Speaker of the House
7. The United States Senate - The Senator Leader

TABLE OF CITATIONS

Eisen v. Carlisle & Jacqueline, et al.
417 US 156 (1974) 9, 12, 14,
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CITATION OF ORDERS RELEVENT TO THIS CASE
(Referred to in text as COO)

A.
In re Solv-Ex Corporation Securities Litigation,
96 Civ. 7575 (LAP)

1. Appointment of lead plaintiffs and their attorney - Docket 12 and Appendix B, findings 4 and 5.

2. Case Management Order No. 1, Docket 13

3. Stipulated Order on consent withdrawing all claims against Deutsche Morgan Grenfell, Inc. and Charles Maxwell, Docket 26.

B.
Solv-Ex Corporation v. Parker Quillen, Quilcap Corporation, Martin Zweig, Weir Jones Corporation
96 Civ. 6057 (JSR) S.D.N.Y.

1. Memorandum denying "motion to dismiss all Solv-Ex claims dated August 12, 1996" by short sellers defendants, dated August 6, 1997. *See also* Appendix B, findings 19 and 25.

C.
In re Solv-Ex Corporation Securities Litigation
96 Civ. 7575 (RMB)

1. Order denying in its entirety "motions to dismiss plaintiffs' claims by all defendants", Docket 57, dated September 6, 2000, Appendix B, findings 9 and 10.

2. Rendall's *pro se* first Response to the Second Amended Consolidated Class Action Complaint, Docket 62, dated December 13, 2000, Appendix B, finding 13.

3. Memo endorsement order by Judge Richard H. Berman (for sanctions and legal fees against Rendall) ex-parte letter from Milberg Weiss (Robert A. Wallner) to Judge Berman, dated December 15, 2000.

4. Stipulation and Order, Rendall withdraws his counterclaims without prejudice, Docket 66 and Appendix B, findings 14 and 16.

5. Order of the Court in response to letters of putative class members requesting "fair and adequate representation", Docket 72, dated May 31, 2001, Appendix B, findings 17, 28, 29, and 30.

6. Order denying Defendant Rendall's request to amend his first Response, Docket 75, dated July 12, 2001, Appendix B, findings 19 and 22.

7. Order acknowledging error in Order (6 above), but maintaining the Order, Docket 77, dated July 24, 2001.

8. Order (on putative class members' letters requesting notice for fair and adequate representation) requiring plaintiffs' counsel to respond promptly, Docket 86, dated January 10, 2002.

9. Order denying Defendant Rendall's appeal against disclosure of his assets, Docket 87, dated January 11, 2002, Appendix B, findings 18, 20, and 21.

10. Order staying Rendall's request for a motion to compel discovery on plaintiffs. Docket 90, dated February 15, 2002, Appendix B, finding 4 (in part).

11. Hearing on April 12, 2002 before the Honorable Richard M. Berman (S.D.N.Y.) on Plaintiffs' motion to dismiss all claims *In re Solv-Ex Corporation Securities Litigation*, 96 Civ. 7575, without prejudice pursuant to Fed. R. Civ. P. Rule 41(a)(2) over Defendant Rendall's memorandum of facts and law in opposition, Dockets 100, 101, dated March 25, 2002.

12. Order of Dismissal and Amended Order of Dismissal without prejudice of all claims pursuant to Fed. R. Civ. P. Rule 41(a)(2), Appendix B.

13. Summary Order affirming the lower court's order of dismissal pursuant to Fed. R. Civ. P. Rule 41(a)(2) by the Second Circuit Court of Appeals, Appendix A.

STATEMENT OF JURISDICTION

A.

Second Circuit Court of Appeals Order affirming lower court's order of dismissal without prejudice dated April, 17, 2003. - Appendix A

B.

The statutory provisions of the Rules of the Supreme Court of the United States, § 1253 and § 1254(1).

STATUTORY PROVISIONS INVOLVED

A.

The Constitutional Provisions:

ARTICLE [VII]

1.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States. than according to the rules of the common law.

ARTICLE XIV

2.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B.
Fed. R. Civ. P. Rules 23(b)(3), 23(c)(2), 23(e) and 41(a)

Rule 23. Class Actions

(b) Class Actions Maintainable. Any action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods of the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination of Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the me member desires, enter an appearance through counsel.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

1966 Amendments

Indeed, under subdivision (c)(2), notice must be ordered, and is not merely discretionary, to give the members in a subdivision (b)(3) class action an opportunity to secure exclusion from the class. This mandatory notice pursuant to the subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject. *see Hausberry v. Lee*, 311 U.S. 32 (1940); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.>306 (1950); ef. *Dickinson v. Burnham*, 197 F.2d 973, 979 (2d Cir. 1954), and studies cited at 979 in 4; see also *All American Airways, Inc. v. Elderd*, 209 F.2d 247, 249 (2d Cir. 1954); *Gart v Cole*, 263 F.2d 244, 248-49 (2d Cir. 1959), cert. denied, 359 U.S.>978 (1959).

Subdivision (e) requires approval of the court, after notice, for the dismissal of compromise of any class action.

2.

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e) of Rule 66, and of any statute of the United States, an action maybe dismissed by the plaintiff without order of court (i) by filling a notice of dismissal at anytime before a service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a dependant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

C.

PRIVATE SECURITES LITIGATION REFORM ACT OF 1995, PL 104-67 (HR 1058) December 22, 1995

TITLE I - REDUCTION OF ABUSIVE LITIGATION

Section 101. Private Securities Litigation Reform.

< < 15 USCA Section 77z-1 > >

< < 15 USCA Chapter 2A > >

(a) SECURITIES ACT OF 1933 - Title I of the Securities Act of 1933 (15 U.S.C. 77a et seq.) is amended by adding at the end of the following new section:

*SEC 27. PRIVATE SECURITIES LITIGATION.

*(a) PRIVATE CLASS ACTIONS -

(c) SANCTIONS FOR ABUSIVE LITIGATION -

(1) MANDATORY REVIEW BY COURT - In any private action arising under this title, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading or dispositive motion.

(2) MANDATORY SANCTIONS - If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. Prior to making a finding that any party or attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall give such party or attorney notice and any opportunity to respond.

I. STATEMENT OF THE CASE

A. Background[1]

The trillion barrel Athabasca oil fields (oil sands) is the setting in Alberta, Northern Canada. BIG OIL's Exploitation of these deposits is the backdrop of this action. Vast toxic tailings have been and are accumulating on the banks of the Athabasca River since the 1970's as a result of the technologies used by BIG OIL. The Athabasca River drains into the Artic. These acutely toxic tailings ponds have been described in Alberta as a disaster waiting

to happen. The sand barriers holding back billions of barrels of toxic sludge tower 300 feet above the river.

Solv-Ex Corporation, a research and development company, has developed technologies proven at bench[1] scale and pilot plant level to extract the oil and associated aluminum from these oil sands deposits without tailings ponds. These patented technologies were and are a threat to BIG OIL's operations in Alberta, Canada. They currently produce about 500,000 Bbls/day of oil and spew out toxic waste of 1,000,000 Bbls/day stored in vast tailings ponds. They have determined to protect their environmentally damaging technologies by ensuring that financing for the capital needed to demonstrate commercial viability of Solv-Ex and Defendant Rendall's credibility needs to be adjudicated by a jury.

The facts and occurrences outlined in this case describe the story of the objective of Solv-Ex Corporation to demonstrate the commercial viability of these technologies and to develop its own multi-billion barrel oil leases in Athabasca. Appendix B, Findings 3.

Solv-Ex's progress was alleged to be misrepresented to shareholders by competitors with detractors led to BIG OIL, a coterie of short sellers and the plaintiffs in this case. Solv-Ex and this Defendant Rendall, Pro Se, the inventor, engineer, former CEO and Chairman of Solv-Ex, claim that the progress was disrupted and then halted by a lack of finance, engineered by those named above. Appendix B, Findings 13, 19, and 25.

The adjudication of these issues in the US Law Courts commenced when Solv-Ex Corporation discovered a conspiracy of short sellers to destroy/hinder the financing of these projects. A lawsuit was filed in SDNY, 96 Civ. 6057, on August 12, 1996 by Solv-Ex. This was followed by a defense of the competitors and a coterie of short sellers in a lawsuit filled in SDNY, 96 Civ. 7575, on October

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[1] Docket 101. Memorandum of Law by Defendant Rendall in Opposition to Plaintiff's Motion to Dismiss dated March, 22 2002 - Extract

4, 1996. Rendall responded with counterclaims. Appendix B, Findings 13, 19 and 25.

B. Concise Statement Relevant to Questions.

This class action was filed on October, 4 1996 and stated to be in relation to an action filed by Defendant Solv-Ex Corporation, 96 Civ 6057, in August 1996.

Lead plaintiffs, with their counsel, were appointed as class representatives in this case (consolidated with similar actions) by Court Order dated December 17, 1996. Case Management Order 1 dated February 28, 1997 ordered plaintiffs to file a motion for class certification forty-five (45) days after defendant's response. A Second Consolidated Class Action Complaint filed on July 21, 1997 inexplicably omitted class claims against two defendants, Deutsche Morgan Grenfell, Inc. and Charles Maxwell. Class claims against Solv-Ex Corporation were removed to the Bankruptcy Court in New Mexico. Appendix B, Findings 8. A motion to dismiss class claims against Butler, Rendall and Campbell was denied by the trial court on September, 6 2000. Defendants responded by Order of the Court on December 13, 2000.

This case represents a conspiracy, Appendix B, Findings 25, instigated by competitors of Rendall as stated in Rendall's response, paragraphs 38, 39, 40, 41, which destroyed Defendant Rendall and putative class members (Solv-Ex shareholders) similarly situated. Plaintiffs contend that Solv-Ex Corporation and Rendall damaged them with "false and misleading statements."

Solv-Ex Corporation was a research and development company owning leases containing over four billion barrels of oil in the Athabascan oil sands of Alberta, Canada. In the process to commercialize the Solv-Ex/Rendall technology for extraction of oil and minerals, Solv-Ex secured permits and substantial financing for a proposed 10,000 barrel per day facility on its leases

by February/March 1996, and its market capitalization reached $800 million.

The subsequent destruction of the price of Solv-Ex common stock and thereby the company, are the facts and occurrences of the Complaint and Defendant Rendall's response on December 13, 2000. Rendall's response exposing the liabilities of plaintiff and, in particular, their lead counsel, prompted an immediate exparte letter from Milberg, Weiss, Bershard, Hynes and Lerach to Judge Richard A. Berman seeking to remove Rendall, Pro Se, and suggesting Rule 11 sanctions. Despite Rendall's vigorous opposition in law and facts, plaintiffs end was achieved on April 17, 2003 by claiming Rendall had no money (assets were irrelevant). The issues of law are now being appealed to this ultimate Court for justice, and support requested for "due process" from the US Government, its agencies, the US House of Representatives and the US Senate. Appendix D 1-7.

C. Facts Material to the Case (Proceedings).

- Citation of Orders (COO) in the case comprise the factual chronology. See also Appendix B, Findings of Fact (Findings).

- Discovery commenced by plaintiffs in March 2001, followed by all parties submitting initial pre-trial discovery, Fed. R. Civ. P. Rule 26(a)(a) on May 1, 2001. Defendant Rendall's initial discovery request to plaintiffs has been stonewalled by Court Order of February, 15 2002, staying Defendant Rendall's request for a motion to compel. COO-C10 and Appendix B, Conclusions 4.

- Several putative class members have written to the trial court expressing concerns about their rights for fair and adequate representation and claims they believed to have caused their damage. The letters that are in the record are dated from May 2001 to January 2002. The trial court's response by order dated February 4, 2002 stated that the

class had not been certified. COO-C5 and 8. Appendix B, Findings 17, 28, and 30.

- After securing Defendant Rendall's asset disclosure over Rendall's strenuous objections, Plaintiffs filed a motion to dismiss the case without prejudice under Fed. R. Civ. P. Rule 41(a)(2), claiming Rendall had no liquid assets, so it was pointless to pursue their claims (which they reasserted). Defendant Rendall opposed asset disclosure with a Memorandum of Law on the law and the facts. COO-C11, Appendix B, Findings 18, 20, and 21.

- The trial court held a hearing on April 12, 2002 and assessed Plaintiff's claims as follows:

  ". . .which according to the plaintiffs, at least in the allegation stage, turned out to be essentially puffing or overstating this case. . . .Again, those are only allegations since we have had no trial."
  COO-C11.

- Defendant reasserted his claims of paragraphs 38, 39, 40, and 41 against Plaintiffs and their counsel opposed the use of Rule 41(a)(2) as prejudicing all parties. Rendall repeatedly cited the provisions of *Eisen v. Carlisle and Jacqueline, et al.*, 417 US 157, 158, as governing law. COO-C11.

- The case was dismissed without prejudice on April 30, 2002 under Fed. R. Civ. P. Rule 41(a)(2) and Rendall's subsequent affidavit providing "findings of fact" and "conclusions of law" by the Court. Reason - Rendall had no money and could not afford legal counsel. Appendix B, Findings 11, 18, 20, and 23; Conclusions of Law 1, 7, and 13.

- The Second Circuit Court of Appeals, after oral argument summarily reaffirmed the lower court's ruling in a unanimous decision on April 17, 2003. Appendix A, paragraph 5 (end).

- The issues of law raised by Defendant Rendall have not been addressed by either the trial or appeal court. The US Supreme court is the remaining ultimate Court for Justice under Rule of Law.

D. Federal Jurisdiction in SDNY.[2]

District Court Jurisdiction

This class action, 96 Civ. 7575, was brought by Sedita on behalf of himself and others similarly situated in the Southern District of New York.

(i) This District Court had jurisdiction over the subject matter of this action pursuant to 28 U.S.C., Sections 1331, 1337 and 1367, and Section 27 of the Exchange Act (15 U.S.C., Section 78aa).

(ii) This action arises under Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. Sections 78j(b) and 78t(a)) as amended by the Private Securities Litigation Reform Act of 1995 (PSLRA) and Rule 10b-5 promulgated there under (17 C.F.R. Section 240 10b-5) and common law fraud.

(iii) Venue is proper in this District Court pursuant to Section 27 of the Exchange Act (15 U.S.C. Section 78aa) and 28 U.S.C. Section 1391(b) and (c). Substantial acts in furtherance of the alleged fraud and /or its effects have occurred within this District Court.

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[2] Brief of the Defendant John S. Rendall, Appellant in Docket 02-7668, United States Court of Appeals for the Second Circuit, Extract.

Court of Appeals Jurisdiction

This Appeal Docket 02-7668 was brought by Defendant Rendall, Pro Se, from the final amended order disposing of all claims of all parties in *Re Solve-Ex Securities Litigation*, 96 Civ. 7575.

(i) This Court of Appeals has jurisdiction in this action pursuant to U.S.C. Section 1291 as the appeal is from the final decision closing the case and as per U.S.C. Section 1294(1).

(ii) This Court has jurisdiction in this case pursuant to Section 22(a) of the Securities Exchange Act of 1933 (U.S.C.A. Section 77a) and Section 27 of the Securities Exchange Act of 1934 (U.S.C.A. Section 78aa) as provided in the U.S.C. Sections 1291, 1294 and 1331.

E. Reasons for Granting Writ of Certiorari.

This case in *Re Solv-Ex Securities Litigation*, 96 Civ. 7575, was dismissed without prejudice by the Honorable Richard M. Berman in the Southern District of New York. The decision was appealed to the Second Circuit Court of Appeals, Case 02-7668, which affirmed the lower court's decision on April 17, 2003 after oral argument on April 7, 2003.

The appeal to the US Supreme Court is based on PREJUDICE to about 8,000 shareholders of Solv-Ex Corporation and Defendant John S. Rendall, the Appellant.

The summary of the case by the Appeals Court is a repeat of the lower court's written opinion and ruling.

The laws of the US Constitution, the Act of the US Congress, the rulings of the US Supreme Court and the Federal Rules of Civil Procedure were pled by Defendant Rendall as "controlling" but were completely set aside and ignored by both the Trial Court and the Appellate Court. The Threshold question to the Appellate Court was and is to this Court.

Does the District Court's dismissal of this case without prejudice under Fed. R. Civ. P. Rule 41(a)(2) violate Rules 23(c)(2) and 23(e) as mandated for fair and adequate representation and adjudication of "class claims"?[3]

Lead Plaintiffs were appointed to represent the class in this action under PSLRA 95 procedures, having met the conditions of Fed. R. Civ. P. Rule 23(b)(3) in a securities class action.[4] This was without prejudice to a challenge to their "fairness and adequacy" in a motion for class certification, as required by Fed. R. Civ. P. Rule 23(c)(2) noticing all members of the class who could be identified individually.[5] See *Eisen v Carlisle & Jacqueline, et al.*, 417 US 156, 157 (1974). In a ruling on this subject of the procedures of the PSLRA 95 in *Greebel v FTP Software, Inc.*, 939 F. Supp. 57 (D. Mass. 1996), id at 60.

> "And so, defendants have the same interests in demanding compliance with these provisions as they have with other requirements relating to certification of a class. Further, permitting a defendant to object on these grounds enhances effective judicial administration of the case. Where, for example, questions arise regarding the adequacy of the notice, it is doubtful that a court could make an informed analysis without the input of a defendant. *Cf.* Weiss and Beckerman, *supra* not 2 at 2101 (explaining that with respect to the determination of class certification, courts permit defendants as the best available

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[3] Brief of Defendant John S. Rendall, Appellant in Docket 02-7668, Untied States Court of Appeals for the Second Circuit - The Argument.
[4] Memorandum by Plaintiffs. Docket 8, dated 12-3-96 and Affidavit of Schulman (Milberg Weiss), Docket 9, dated 12-3-96.
[5] Affidavit of Cleary Gottleib (m. Lowenthal), Docket 11, dated 12-16-96.

> surrogates to mount challenges to the typicality and adequacy of the putative class members to proffer opposition because, a *fortiori*, they are aware of the lawsuit."

This is well established by case law as succinctly stated in ***Wright, Miller and Kane***, Federal Practice and Procedure, Civ. 2d Vol. 7B. Section 1786, page 191:

> "In light of these decisions, it seems clear that effective notice must be provided in a Rule 23(b)(3) action as a prerequisite to binding the absent members of the class. There is no rational basis for treating class suits differently from other actions in which an attempt is made to affect the rights of nonparties. Moreover, the rule itself, by calling for "the best notice practicable under the circumstances: and requiring that notice be given on an individual basis to identifiable members of the class, appears to have been drafted with this constitutional point in mind"

Section 1786, page 194:

> "As several courts have noted, the critical problem raising due process concerns in action under subdivision (b)(3) is not simply notice of the institution of the action, but whether the absent members actually are adequately represented. Effective representation is especially important to Rule 23(b)(3) actions because the class members are only loosely associated by common question of law or fact, rather than by any

pre-existing or continual legal relationship"

Before lead plaintiffs attempt to compromise the class claims of absent members, not only is an issue of notice for fair and adequate representation required by Fed. R. Civ. P. Rule 23(c)(2), but an additional specific provision in 23(e) barring such compromise without notice to all members. Orders compromising class claims in this action without notice under Fed. R. Civ. P. Rule 23(c)(2) and 23(e) are respectfully requested to be rescinded by this Court to protect the rights of absent class members. They are:

A. Stipulated order of dismissal of all claims without prejudice against Deutsche Morgan Grenfell, Inc. (DGM) dated August 15, 1997.

B. Order of withdrawal of counterclaims of Defendant Rendall without prejudice dated February 17, 2001.

C. Order of dismissal of class action 96 Civ. 7575 (RMB) without prejudice dated May 1, 2002.

In fact, Order "A" dismissing class claims against DMG is also in error as Defendant Rendall did not stipulate to the Order dated August 15, 1997. This error was known to all parties due to a Motion of Withdrawal, dated July 28, 1997 by Mitchell Lowenthal of Cleary, Gottlieb, Steen & Hamilton. Lowenthal effectively ceased representation of Defendant Rendall on July 28, 1997. Rendall became aware of this fact in May 2002.

The classic case of *Eisen v. Carlisle and Jacqueline, et al.*, in the Second Circuit Court of Appeals, was ruled on by the US Supreme Court in October 1973. *Eisen v Carlisle and Jacqueline, et al.*, 417 US 156-186 clearly and unambiguously supports the argument of Defendant Rendall. To quote directly from *Eisen*:

(a) The express language and intent of Rule 23(c)(2) leave no doubt that individual notice

> must be sent to all class members who can be identified through reasonable effort. Here there was nothing to show that individual notice could be mailed to each of the two and a quarter million class members whose names and addresses were easily ascertainable, and for these class members individual notice was clearly the "best notice practicable" within the meaning of Rule 23(c)(2). Pp. 173-175.

This is exactly what the plaintiffs committed to do in filing this class action complaint. It is the fiduciary duty to putative class members.

The next key question is:

Were the provisions of an Act of US Congress, the PSLRA 95 set aside and ignored in the dismissal of this case without prejudice?

The whole reason for the PSLRA by Act of US Congress in 1995 was to "reduce abusive litigation and coercive settlements: Final adjudication of this action is mandated under PSLRA to make a determination as to malicious prosecution." 15 USCA 77z 1(a)*(c)(1).

Rendall claimed from the very start of his *pro se* pleadings that this action was abusive litigation as it was a strike suit against the conspiracy claims to drive down the price of shareholders stock in Solv-Ex filed before this action in the SDNY in August, 1996, *Solv-Ex Corporation v. Parker Quillen, et al.*, 96 Civ. 6057. COO-B. The claims were in response to plaintiffs claims in the following paragraphs:

> "38. The allegations contained in Paragraph 38 of the Complaint are denied, as a class has not been certified. The class

action as described must exclude the plaintiffs, their attorneys, Solv-Ex short sellers and Solv-Ex competitors, and is wrongfully directed at the defendants.

39. The allegations contained in Paragraph 39 of the Complaint are denied. The members of the class were damaged by the actions of the plaintiff and their attorneys.

40. The allegations contained in Paragraph 40 of the Complaint were denied. The members of the class were damaged by the plaintiffs and their attorneys' wrongful conduct in violation of tort and antitrust laws, in addition to malicious abuse of process.

41. The allegations contained in Paragraph 41 of the Complaint are denied. By reason of the unclean hands and using this complaint to strike at the Solv-Ex suit against the short sellers, therefore, the plaintiffs and their attorneys cannot adequately protect members of this class."[6]

In addition to this blatant avoidance of "final adjudication" by Milberg, Weiss, Bershad, Hynes & Lerach, coercion was practiced to dismiss this case without prejudice.[7] Defendant Rendall, Pro Se, was coerced into withdrawing his separation section of

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[6] Docket 64 dated December 13, 2000. Rendall's initial Response to the Complaint. C00-C2. Also, Appendix B, Findings 25.

[7] C00-C3, Appendix E-1 and B, Findings 13 and 14.

counterclaims without prejudice,[8] then plaintiffs objected to Rendall's request for amendment of his response and the court agreed.[9] Finally, plaintiffs secured Rendall's asset disclosure over his vigorous objections.[10]

The final question is:

Did the Trial Court have any authority under Fed. R. Civ. P. Rule 23 to conduct "mini trials" prejudicing Defendant Rendall and claims of putative class members who informed the Court that their lead attorney, Milberg, Weiss, Bershad, Hynes and Lerach, was not fairly or adequately representing them?

The Trial Court confirms in its amended order for dismissal without prejudice under Fed. R. Civ. P. Rule 41(a)(2), that such mini trials were conducted by Judge Richard H. Berman in his findings of fact and conclusions of law. There was no motion practice or "due process" examination of the facts found. The Trial Court had no authority to conduct such mini trials without first noticing all putative class members and without the due process provisions of the law.

The issue is succinctly summarized in *Eisen v. Carlisle and Jacqueline, et al.*, 417 US 156, 157, 158 (1974), id at 3(a)(b):

> "(a) There is nothing either in the language or history of Rule 23 that give a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action and, indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits

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[8] Appendix B, Findings 14 and 16.
[9] Appendix B, Findings 19 and 22.
[10] Appendix B, Findings 20 and 21.

> of a class action without first satisfying the requirements of the Rule. Pp. 177-178.
>
> (b) A preliminary determination of the merits may be substantially prejudice a defendant, since it is unaccompanied by the traditional rules and procedures applicable to civil trials. P. 178."

In deciding on dismissing this class action complaint without prejudice, the District Court in effect threw out Defendant Rendall's claims by Summary Judgment without the due process mandated by Fed. R. Civ. P. Rule 56. No motion in rebuttal of Rendall's claims were filed, nor was there any showing "that there was no genuine issue as to any material fact." Defendant Rendall's pleadings are full of genuine issues which have not be rebutted in the record. The law that prevents such a summary judgment decision has been well established by the US Supreme Court in *Poller v. Columbia Broadcasting*, 368 US 464, 473 (1962).

> "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Defendant Rendall has compulsory counterclaims, which can only be adjudicated in this action.[11] In any new action, Defendant Rendall would be injured irreversibly by denial of the availability of the Statute of Limitations relating back to the original Complaint. Letters sent for Amicus Curiae help Appendix D1-17.

SUMMARY

To summarize, these issues were raised and not addressed by the Trial Court and the Court of Appeals.

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[11] Appendix B, Findings 13, 19, and 25.

FIRSTLY, the lower court (SDNY) ruling has to be rejected in total, as it was not based on the traditional due process rules for adjudication claims in a class action lawsuit, *Eisen v. Carlisle and Jacqueline, et al.*, 417 US 156, 157, 158 (1974), id at 3(a)(b), pages 177-178. The ruling is based on inferences, misrepresentations, arguments of attorneys construed as evidence, half-truths and innuendos without the protections offered by due process to examine such conclusions.

SECONDLY, PREJUDICE TO SHAREHOLDERS (putative class members). Affidavit of Cleary, Gottlieb, Steen & Hamilton questioned the fairness and adequacy of plaintiffs on December, 16, 1996. No opportunity as afforded by Fed. R. Civ. P. Rule 23(c)(2) was given to the putative class members to assert their due process constitutional rights of notice individually, *Eisen v. Carlisle and Jacqueline, et al.*, 417 US 156, 157, 158 (1974), id at 2(a)(b), page 176.

THIRDLY, PREJUDICE TO DEFENDANT JOHN S. RENDALL. The US Congress acted in 1995 to reduce abusive litigation such as "strike suits" in the Private Securities Litigation Reform Act. Malicious prosecution claims as in this present case were subject to mandatory review upon final adjudication, 15 USCA 77z 1(a)*(a)(c)(1). The lower courts cannot abrogate the laws of the US Congress without an explanation or even legal argument to justify such abrogation.

Further, Defendant Rendall in his first response had claims against Plaintiff's and their attorneys for conspiring to file this strike suit. The claims were in tort, conspiracy, anti-trust and malicious abuse of process. Under Fed. R. Civ. P. Rule 8(c), justice requires that these claims be adjudicated as counterclaims. Rule 41(a)(2) is also subject to the PSLRA 95 and Fed. R. Civ. P. Rule 23, which has been ignored by the Trial Court and the US Court of Appeals for the Second Circuit. What is at stake is the rule of law.

CONCLUSION

The Supreme Court of the United States, for the good and sufficient reasons above, remands this case back to the Southern District of New York to be adjudicated by the Rule of Law.

1. Fed. R. Civ. P. Rule 23(c)(2) notice to all shareholders by order of the Court, and all orders before "fair and adequate" representation of the plaintiff class to be rescinded.

2. Defendant Rendall be allowed a first amendment to his response to the Complaint dated December 13, 2000 as per Fed. R. Civ. P. 15(a) and 13(a) as justice requires it.

3. Parties are not to be prejudiced by any judicial proceedings of findings without the due process of law.

4. All costs in the this case are for the opponents, Milberg, Weiss, Bershad, Hynes & Lerach, for the plaintiffs.

For the aforementioned reasons, John S. Rendall respectfully requests that this Court grant a Writ of Certiorari.

Dated: June 30, 2003

Respectfully submitted,

John S. Rendall, Pro Se

APPENDIX A

SDNY/NYNY
96-CV-7575
Berman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECENDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR THE PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

As a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th day of April, Two Thousand and three.

PRESENT:
Hon. John M. Walker, Chief Judge
Hon. James L. Oakes
Hon. Ralph K. Winter, Circuit Judge

SEAL OF THE US
COURT
OF APPEALS
SECOND CIRCUIT
Filed April 17, 2003

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In re Solv-Ex Corporation Securities Litigation — No. 02-7668

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APPEARING FOR THE APPELLANT:

John S. Rendall, Pro Se
Albuquerque, NM

APPEARING FOR APPELLEES:

Robert A Wallner,
Milberg, Weiss, Bershad,
Hynes, Lerach, LLP (Wechsler
Harwood, LLP, on the brief),
New York, NY

Appeal from the United States District Court for the Southern District of New York (Richard M. Berman, District Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDED AND DECREED that the judgment of said District Court is **AFFIRMED.**

Defendant- Appellant, John Rendall, Pro Se, appeals from the May 6, 2002 order of the United States District Court for the Southern District of New York granting plaintiffs' motion for the voluntary dismissal, pursuant to Fed. R. Civ. P. 41, and denying Rendall's motion for leave to amend his answer. We affirm.

Plaintiff's are owners of common stock of defendant Solv-Ex Corporation ("Solv-Ex"). In October 1996, plaintiffs initiated this action against Solv-Ex, and its chief officers and directors, including Rendall, the Chief Executive Officer and Chairman of the Board of Directors of Solv-Ex, alleging various claims under federal and state law. Although the action was styled as a class action, the class was never certified pursuant to Fed. R. Civ. P. 23.

Between August 1997 and January 1999, defendants obtained approximately ten extensions of time to file their answer.

During that period, Solv-Ex filed for bankruptcy and, in accordance with the bankruptcy court's reorganization plan, the district court dismissed the claims against Solv-Ex, with prejudice, in June 1999 leaving only defendants. In the fall of 2000, the district court granted Rendall's counsel's motion to be relieved, allowing Rendall to proceed pro se. In December 2000, Rendall filed an answer and counterclaim alleging that plaintiffs' counsel had brought the action in bad faith. In February 2001, Rendall withdrew his counterclaim, without prejudice. In June 2001, Rendall moved to amend his answer to include the previously withdrawn counterclaim. The district court denied the motion, and in January 2001, Rendall moved, a second time, to amend his answers to include a counterclaim against "the short sellers of Solv-Ex," who were defendants in another action. In March 2001, plaintiffs moved for a voluntary dismissal and discontinuance, pursuant to Fed. R. Civ. P. 23(e) and 41(a)(2), because the defendants' financial records revealed that they lacked the assets or insurance that would enable them to satisfy a potential judgment. The district court granted plaintiffs' motion to voluntarily dismiss the action and denied Rendall's motion to amend his answer, specifically noting that: (1) Rendall's potential counter claim was non-specific, "border[ed] on incoherent and frivolous," and was against non-parties, and thus did not warrant leave to amend; and (2) Rendall was, in any event, free to commence a separate action against those whom he believed he had claims against. Rendall appeals that order.

We review voluntarily dismissals under Rule 41(a)(2), as well as denials of leave to amend, for abuse of discretion. See Local 802, Associated Musicians v. Parker Meridian Hotel, 145 F.3d 85, 89-90 (2d Cir. 1998) (leave to amend); Zagano v Fordham Univ., 900 F.2d 12, 14 (2d Cir. 1990) (voluntary dismissal). As Rendall is proceeding pro se, we construe his submissions liberally. See Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996). When a defendant does not consent to the voluntary dismissal of an action, such dismissal may be granted only "upon such terms and conditions as the court deems proper." See Fed. R. Civ. P. 41(a)(2). Factors used to determine when a voluntary dismissal is proper include: (1) the plaintiffs' diligence in bringing the motion; (2) any "undue vexatiousness" on the plaintiffs' part; (3) the extent to which the suit has in preparation

for trail; (4) the duplicative expense of relitigation; and (5) the adequacy of plaintiffs' explanation for the need to dismiss. See Catanzano v. Wing, 277 F.3d 99, 109-10 (2d Cir. 2001); Zagano, 900 F.2d at 14.

After reviewing these factors, we concluded that the district court did not abuse its discretion in granting the plaintiffs' motion for voluntary dismissal: (1) plaintiffs did not delay in bringing the motion; (2) there is no suggestion that plaintiffs were attempting to harass Rendall by pursuing their legal claims; (3) the action has progressed very little and, as no discovery has taken place, the expense to Rendall has been relatively minimal; (4) plaintiffs' explanation for dismissing the action -- Rendall's inability to satisfy any judgment entered -- is entirely reasonable.

Rendall's claim that the district court improperly denied him leave to amend his answer to add a counterclaim is equally meritless. Rendall's proposed counterclaim sought to add claim against individuals who were not parties to the original action. In light of the dismissal of the complaint, the district court acted within its discretion in denying the motion to amend. See Finley v. Giacobbe, 79 F.3d 1285, 1298 (2d Cir. 1996).

Finally, Rendall contends that the dismissal was erroneous because proper notice of dismissal was not provided under Fed. R. Civ. P. 23(e) to the putative class members. Plaintiffs were never actually certified as a class. Assuming arguendo that notice is required prior to dismissal when a class has not yet been certified, see 78 Wright & Miller, Federal Practice and Procedure, § 1797 (2d ed. 2003), plaintiffs disseminated notice of the dismissal over Business Wire, the medium used at the outset of the litigation to provide notice of the suit to prospective class members. Second, plaintiffs mailed a copy of the order of dismissal to putative class members who had written to plaintiffs' co-counsel. We find that this method of providing notice, of which the district court approved, was reasonable in the circumstances and was not likely to prejudice any of the shareholders.

We have reviewed appellant's other agreements and find them to be without merit. Accordingly, for the reasons discussed, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
Roseann B. MacKechnie,

Clerk

By: s/Lucille Carr
Date: April 17, 2003

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOLV-EX CORPORATION SECURITIES LITIGATION	96 Civ. 7575 (RMB)
	ORDER OF DISMISSAL

Based upon the record of these proceedings, including, among other things, the oral argument held today in open court (see Transcript, dated April 12, 2002) and the prior submissions of the parties, the Court directs as follows:

(1) that, good cause having been shown, this matter be and hereby is dismissed without prejudice, pursuant to Federal Rule of Civil Procedure 41(a)(2);[1]

(2) Plaintiffs' counsel, Messrs. Milberg Weiss Bershad Hynes & Lerach LLP and Messrs. Wechsler Harwood Halebian & Feffer LLP, shall cause notice of this dismissal to be published in Business Wire within 10 business days of this date.

(3) Plaintiffs' counsel shall cause a copy of the Order of Dismissal to be mailed to those shareholders of Solv-Ex

[1] The application to dismiss is unopposed by Defendant W. Jack Butler, who is represented by counsel; it is unopposed by Defendant Herbert M. Campbell, III, an attorney, who is appearing pro se; and it is opposed by Defendant John S. Rendall ("Rendall"), who was initially represented by counsel but is now appearing pro se. The case had previously been dismissed as to the corporate Defendant, Solv-Ex Corporation, on June 25, 1999.

Corporation who have written to such counsel or to the Court on or before April 12, 2002;

(4) pro se Defendant John S. Rendall's (further) application, dated January 23, 2002, for leave to amend his Answer is denied without prejudice to his pursuing in a separate action any claims, if any, he may have; and

(5) the parties and attorneys to these proceedings have complied with the requirements for Federal Rule of Civil Procedure 11(b).

Order

The clerk is respectfully requested to close this case, Nos. 96 Civ. 7575 and 96 Civ. 8744.

Dated: New York, New York
April 12, 2002

s/RMB

Richard M. Berman, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SOLV-EX CORPORATION SECURITIES LITIGATION	96 Civ. 7575 (RMB) AMENDED ORDER OF DISMISSAL

I. Background.

By order, dated April 12, 2002 ("Order"), the Court among other things, granted Plaintiffs' application and dismissed this matter without prejudice pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.) 41(a)(2), and denied pro se Defendant John S. Rendall's ("Rendall") (further) application, dated January 23, 2002, for leave to amend his Answer without prejudice to his pursuing in a separate action any claims, if any, he may have. See Order attached hereto. On or about April 16, 2002, Rendall moved for reconsideration of the Order, pursuant to Local Civil Rule 6.3 of the Southern District of New York ("Rendall's Mem.") at 3. On April 19, 2002, Plaintiffs opposed Rendall's application for reconsideration and, on April 23, 2002, Rendall submitted a reply memorandum ("Rendall's Reply Mem."). For the following reasons, Rendall's motion is granted in part and denied in part.

II. Standard of Review.

Motions for reconsideration are governed by Local Civil Rule 6.3 and are within the sound discretion of the district court. *Schaffer v Soros*, No. 92 Civ. 1233, 1994 WL 592891, at *1 (S.D.N.Y. Oct. 31, 1994); *See System Management Arts, Inc., v. Avesta Tech., Inc.*, 106 F.Supp.2d 519, 521 (S.D.N.Y. 2000). "[T]he motion must demonstrate that the court overlooked controlling decisions or factual matters that were put before it on the underlying

motion." *Stoner v. New York City Ballet Co.*, No. 99 Civ. 0196, 2002 WL 523270, at *2 (S.D.N.Y.) Mar. 22, 2001)). A Rule 6.3 motion is "not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *In re Houbigant, Inc.*, 915 F.Supp. 997, 1001 (S.D.N.Y. 1996). Even where, as here, these bases for reconsideration are not present, courts have written to clarify their prior ruling. *See*, e.g., *Von Schmidt v. Kramer*, 9.F.Supp. 2d 100, 104 (D.Conn. 1998).

III. Analysis.

The Court here clarifies the Order by amplifying and supplementing its prior findings of fact and conclusions of law.[1]

The Order was based upon the record of these proceeding, including, among other things, the oral argument held on April 12, 2002 and the prior submissions of the parties; Plaintiffs' Memorandum of Law, dated March 1, 2002, in support of their motion voluntarily to dismiss this action without prejudice ("Pls.' Mem."); and Rendall's Memorandum of Law, dated March 22, 2002, in opposition to that motion ("Rendall's Opp. Mem.").

Rendall's Mem. presents a helpful suggestion that the Court clarify and expand upon its Order to include additional findings of fact and conclusions of law. *See Mattel, Inc. v. Robarb's Inc.*, No. 00 Civ. 4866, 2001 WL 797478, at *2 (S.D.N.Y. July 12, 2001) ("Reconsideration is granted in part, solely to clarify the reasoning supporting the Court's holding. . ."). The Court, in addition to previous findings of fact and conclusions of law, finds the following in support of its earlier determination:

1. No motion for class certification had been filed and no class has been certified.

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[1] The Court incorporates by reference, among other things, the prior proceedings herein, prior findings of fact and conclusions of law, and the record of the proceedings held April 12, 2002.

2. Plaintiffs had purchased shares of Solv-Ex Corporation ("Solv-Ex") between February 15, 1995 and September 30, 1996 ("Class Period") and commenced this action in the Fall of 1996 (as a putative class action) against, among others, Solv-Ex and certain of its officers and directors, including Rendall, as Chief Executive Officer and Chairman of the Board of Solv-Ex, Herbert M. Campbell, III, Senior Vice-President and Secretary ("Campbell"), and W. Jack Butler, President ("Butler") (collectively the "Individual Defendants");

3. During the Class period, Solv-Ex purported to be "in the process of implementing a project to commence mining operations and to construct a commercial oil extraction and refining plant and an accompanying mineral co-production plant facility in Alberta, Canada." Second Consolidated Amended Class Action Complaint, dated July 21, 1997, ¶ 2. Plaintiffs alleged that "although (Solv-Ex) repeatedly represented throughout the Class Period that the Alberta Project was on track to begin commercial oil production by late 1996 or early 1997, unbeknownst to investors, Solv-Ex was represented in Alberta Energy and Utilities Board "during the Class Period that it was constructing only an 'experimental plant'" Id. ¶ 7. Plaintiffs further alleged, among other things, that Reuters News Service quoted Rendall as stating that "construction of the $150 million plant would be completed in December [1996]" and that "[t]he technology patented by Solv-Ex had worked in the pilot plant." Id. ¶ 118;

4. On December 17, 1996, The Court (Preska, J.) consolidated the action styled *Sedita v. Solv-Ex Corp., et al.*, 96 Civ. 7575 with the action styled *Grossman v. Butler, et al.*, 96 Civ. 8744;

5. By Order, dated December 17, 1996, the Court (Preska, J.) appointed Lead Plaintiffs in this action and approved the Lead Plaintiffs' selection of Milberg, Weiss, Bershad,

Hynes & Lerach, LLP and Wechsler, Harwood, Halebian & Feffer, LLP as Co-Lead Counsel.

6. Plaintiffs filed their Second Consolidated Amended Class Action Complaint ("Complaint") on or about July 21, 1997;

7. The Individual Defendants, who were initially represented by counsel, sought and received (no less than) twelve extensions of time to answer the Complaint;

8. On or about August 1, 1997, Solv-Ex filed for bankruptcy in the United States Bankruptcy Court for the District of New Mexico. By Order, dated June 25, 1999, the Court dismissed Plaintiffs' claims against Solv-Ex with prejudice. Order, dated June 25, 1999, at 1; see Solv-Ex Corporation's Amended Plan of Reorganization, dated June 23, 1998, Article VIIa, Article IX §§ 9.1, 9.3, 9.4 ("all Persons who have held, hold or may hold Claims. . .are permanently enjoined. . .from (i) commencing or continuing in any manner or action or other proceeding of any kind with respect to any such Claim against. . .Solv-Ex. . .").

9. On July 27, 1999, the Individual Defendants moved, by their counsel, to dismiss the Complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). While the Individual Defendants' motion to dismiss the Complaint was pending, all discovery was stayed. See 15 U.S.C. § 78u-4(b)(3) (Private Securities Litigation Reform Act);

10. On September 6, 2000, the Court denied the Individual Defendants' motion to dismiss. Order, dated September 6, 2000 at 10, 12 (Plaintiffs "have adequately alleged facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness by defendants" under Section 10(b) ("Section 10(b)") of the Securities and Exchange Act of 1934 as amended, 15 U.S.C.A. § 78j(b) ("Exchange

Act") and "have met their [] pleading burden" under Section 20(a) of the Exchange Act. 15 U.S.C. § 78t(a).);

11. In a letter to the Court, dated September 19, 2000, Stuart T. Rebish, Esq. of Shiff & Tisman, counsel for Solv-Ex, Rendall, and Campbell, wrote that "[o]ur statements for services rendered, some as early as September 1999, remain unpaid, and have expended additional time for which we have not yet submitted a bill. Messrs. Rendall and Campbell have informed us that they are unable to pay us what we are owed, and that they cannot pay us for future services." (emphasis added). In a letter to the Court, dated September 21, 2000, John D. Phillips, Esq,. co-counsel for Solv-Ex, Rendall and Campbell, wrote: "Both Messrs. Rendall and Campbell have informed me that they cannot pay counsel for any services, past or future, rendered in their defense."[2] The Court, reluctantly, permitted Messrs. Rebish and Phillips to with draw from the action and, mindful of the complexity of the issues involved, nevertheless allowed Messrs. Rendall and Campbell to proceed pro se. *See* Transcript, dated November 9, 2000, at 4 (The Court "worried about people's ability [acting pro se] to protect and vindicate their rights.");

12. Defendant Campbell is a lawyer and was General Counsel to Solv-Ex. Defendant Rendall is not a lawyer;

13. On or about December 13. 2000, Rendall filed his Answer. It purported to include a counterclaim against shareholder Plaintiffs and their attorneys. Answer at 22-23 ("Rendall requests plaintiff[s'] counsel. . .be made involuntary party plaintiffs, and that the allegations set out in this counterclaim be asserted against them as the primary wrongdoers, or, as jointly and severally liable

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[2] As discussed more fully below, Mr. Phillips no longer represents Solv-Ex, Rendall, and Campbell but, somewhat surprisingly, has recently contacted the court on behalf of approximately twenty-five former shareholders of Solv-Ex. See paragraphs 24, 26, 28-30.

with the named plaintiffs for the damages suffered by Defendant Rendall.");

14. On February, 14 2001, at a conference held with the Court, Plaintiffs' counsel and Rendall discussed with the Court issues regarding Rendall's counterclaim including a possible motion to dismiss the counterclaim. *See* Transcript, dated February 14, 2001; *see also* Rendall's Proposed Stipulation, dated February 6, 2001 ("It is hereby stipulated. . .that the counterclaims contained in the Answer. . .are hereby withdrawn without prejudice. . ."). Plaintiffs and Rendall did not agree upon Rendall's suggestion that the statute of limitations for his counterclaim be tolled. Id. at 4;

15. At the February 14, 2001 conference, the Court granted Rendall's request to amend his Answer and set a briefing schedule for Plaintiffs, thereafter, to move to dismiss Rendall's counterclaim. Id. at 11-12 (Rendall was directed to serve and file an amended Answer by February 26, 2001 and Plaintiffs were to file their motion to dismiss by March 20, 2001);

16. On February we, Coo1, three days before Rendall's amended Answer was due to be filed with the Court, upon the stipulation of Rendall and Plaintiffs' Co-Lead Counsel, Messrs. Wechsler, Harwood, Halebian & Feffer, LLP and Milberg, Weiss, Bershad, Hynes & Lerach, LLP, the court ordered the withdrawal of Rendall's counterclaims without prejudice. Order, dated February 23, 2001, at 1 ("the counterclaims. . .are hereby withdrawn without prejudice");

17. On May 31, 2002, respectively, in response to letters received by the Court from persons identifying themselves as former shareholders of Solv-Ex, the Court issued orders advising that "this action has not been certified as a class action." Order, dated May 31, 2001, and that "such shareholders should be aware that they are also (and have

been throughout this proceeding) free to pursue their choosing." Order, dated January 31, 2003. Copies of these orders were mailed to those persons who had written to the court;

18. In or about June 2001, Plaintiffs sought: discovery of additional financial information to determine whether the remaining Individual Defendants, i.e., Messrs. Rendall, Campbell, and Butler, had the financial resources to satisfy a potential judgment in this action if the case were to advance to trial and judgment;

19. On June 26, 2001, Rendall requested leave to amend his Answer to include his previously withdrawn counterclaims, and to include claims against Plaintiffs, Plaintiffs' attorneys, and presumable many unnamed "competitors" and "short sellers" and the Securities and Exchange Commission. Rendall's Mem. at 2 ("the plaintiff[s'] attorney(s) worked with the short sellers of Solv-Ex Corporation common stock, the Company[s'] (Solve-Ex Corporation) [] competitors, and the Securities and Exchange Commission to unlawfully stop the financing efforts of Solv-Ex Corporation, and thereby caused it to file for Chapter 11 bankruptcy protection. . ."). The Court denied Rendall's request by Order, dated July 11, 2001 and by Memo Endorsed Order, dated July 23, 2001. *See* Order, dated July 11, 2001, at 9 ("Mr. Rendall has not presented any new facts to support repleading the dismissed counterclaim. . .Defendant has already received more than enough extensions of time to answer this 1996 complaint and to prepare his defenses and counterclaims. The current counterclaim will serve only to further lengthen this already five year old case.") (emphasis in original) (citation omitted);

20. Defendant Rendall resisted the additional discovery referred to in paragraph eighteen above. After a conference before Magistrate Judge Ronald L. Ellis on

October 15, 2001, Plaintiffs were permitted to serve the Individual Defendants with their discovery requests;

21. On November 1, 2001, Rendall moved for a protective order precluding additional financial discovery and, on November 14, 2001, Magistrate Ellis denied Rendall's motion and ordered Rendall to respond to Plaintiffs' discovery requests by November 23, 2001. Order, dated November 23, 2001. On November 26, 2001, Rendall filed objections to Magistrate Ellis' Ruling. On January 9, 2002, the Court affirmed Magistrate Ellis' ruling and concluded that Rendall "failed to show good cause to justify an order of protection" precluding discovery of his finances. Order, dated January 9, 2002, at 1 (quoting Order, dated November 14, 2001). On January 18, 2002, Rendall responded to Plaintiffs' discovery requests; on January 22, 2002 Campbell served his response; and on February 15, 2002, Butler served his response. The financial disclosures of the Individual Defendants, according to the Plaintiffs, showed that they had "limited liquid assets." Pls.' Mem. at 5;[3]

22. On January 23, 2002, Rendall (again) applied for leave to amend his Answer to assert counterclaims purportedly as a class representative. *See* Letter to the Court, dated January 23, 2002 ("John S. Rendall asserts these claims of [No.] 96 Civ. 6057 [*Solv-Ex Corp. v. Parker Quillen, et al.*, which were dismissed without prejudice on July 31, 1997,] as belonging to him and others so situated (class members) in [No.] 96 Civ. 7575") Transcript, dated April 12, 2002, at 27-28 ("the wrongful conduct was tort, antitrust, malicious use of process:);

23. On March 1, 2002, Plaintiffs filed a motion voluntarily to dismiss this matter as against the Individual Defendants

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[3] It should be noted that Rendall has asserted that while he has limited liquid assets, he has "several hundred million" dollars in intellectual property. See e.g., Transcript, dated February 1, 2002, at 6; Transcript, dated April 12, 2002, at 24-25.

without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), and opposed Rendall's request for leave to amend his Answer. Following the financial discovery referred to in paragraph eighteen above, Plaintiffs had concluded that the Individual Defendants "do not have the financial resources to satisfy a potential judgment in this action, and [] continued pursuit of this action through long and costly proceedings would result, at best, in a hollow victory for the Plaintiffs and the putative class." Pls.' Mem. at 1;

24. Individual Defendants Campbell and Butler did not oppose Plaintiffs' motion voluntarily to dismiss this matter. Nor did Mr. Phillips "oppose" Plaintiffs' motion on behave of the approximately 25 ex-shareholders of Solv-Ex who had contacted him. Transcript, dated April 12, 2002, at 35 (Mr. Phillips stated that these ex-shareholders "are certainly not opposed to the dismissal of the claims against the individual named defendant:); *see* Letter to the Court, dated April 5, 2002;

25. Only Rendall opposed Plaintiffs' motion. On March 22, 2002, Rendall submitted a memorandum of law in opposition to Plaintiffs' motion voluntarily to dismiss and in support of his (further) application to amend his Answer. Transcript, dated April 12, 2002, at 27 (Rendall stated that Plaintiffs "filed the complaint. . .to damage me. And the wrongful conduct was tort, antitrust, malicious use of process. They [Plaintiffs] worked in [conspiracy] with others to destroy Solv-Ex.") On April 5, 2002, Plaintiffs submitted a reply memorandum responding to Rendall's opposition ("Pls.' Reply Mem.");

26. On April 12, 2002, oral argument was held on Plaintiffs' motion voluntarily to dismiss this matter and Rendall's opposition and (further) application for leave to amend his Answer. *See* Transcript, dated April 12, 2002. Attendees included Plaintiffs' Co-Lead Counsel, Messrs. Wechsler, Harwood, Halebian & Feffer, LLP and Milberg, Weiss, Bershad, Hynes & Lerach, LLP, Individual Defendant

Butler's Counsel, Louis Soloman, Esq., Individual Defendant Rendall, Mr. Phillips, and Defendant Rendall's brother, David Rendall.

27. Rendall does not contest that he lacks the financial resources to satisfy a potential judgment by Plaintiffs, *see* Transcript, dated April 12, 2002, at 24-25 ("I am not making the claim that I have the resources to satisfy a judgment.");

28. Mr. Phillips' role in this proceeding in unclear. Originally, as noted, he was co-counsel to Solv-Ex, Rendall, and Campbell. At the oral argument, Mr. Phillips "appeared" on behalf of former shareholders of Solv-Ex but acknowledged that, since he had previously represented Solv-Ex, Rendall, and Campbell in this matter, he "would have grave problems representing [these] other shareholders seeking to intervene as members within [the proposed] class. . .and [] would never seek to do that [because of] a conflict interest." Transcript, dated April 12, 2002, at 35. Indeed, Mr. Phillips, who is not a member of the bar of the Southern District of New York, *see* id, at 33-34, did not (even) seek pro hac admission for the April 12, 2002 proceeding pursuant to Local Rule 1.3 U.S. Dist. Ct. Rules S. & E.D.N.Y., Civil Rule 1.3 (2001); *see* Memo Endorsed Order, dated April 9, 2002 ("Please check the FRCP [Federal Rules of Civil Procedure] & Local Rules [of the Southern District of New York] regarding what appropriate role you may play. Subject to that, you are more than welcome.");

29. At the oral argument, Mr. Phillips also expressed the view that these ex-shareholders who had contacted him "are certainly not opposed to the dismissal of the claims against the individual named defendants. . ." Transcript, dated April 12, 2002, at 35;

30. By letter to the Court, dated April 23, 2002, Mr. Phillips, purportedly on behalf of ex-shareholders, stated that these

ex-shareholders "support" Rendall's request for reconsideration. Letter to Court, dated April 23, 2002, at 2;

31. None of the ex-shareholders of Solv-Ex who wrote to the court or who are in contact with Mr. Phillips have sought to intervene pursuant to Fed. R. Civ. P. 24. See Letter to the Court from Robert A. Wallner, Esq,. dated April 26, 2002.

CONCLUSIONS OF LAW

1. There is a sound basis to dismiss this matter without prejudice since Solv-Ex has already been dismissed from this matter with prejudice, the Individual Defendants cannot satisfy a potential judgment in this action, no class has been certified, two of the three Individual Defendants do not oppose dismissal, and no prejudice has been shown. *Guzman v. Hazemag U.S.A., Inc.*, 145 F.R.D. 308, 309 (E.D.N.Y. 1993) ("[T]he presumption in this circuit is that a court should grant a dismissal pursuant to [Rule] 41 (a)(2) absent a showing that the defendants will suffer substantial prejudice as a result.");

2. As noted, Individual Defendants Campbell and Butler do not oppose Plaintiffs' motion. Rendall's contentious that he may be prejudiced, respectfully, have no merit. Indeed, it is the Plaintiffs who would be prejudice if Rendall's "claims" are allowed to go forward here;

3. There has not been any undue vexatiousness by Plaintiffs. If anything, Defendants have slowed things down. *Saatchi Gallery v. Gorney*, No. 98 Civ. 4542, 1999 WL 33464, at *1 (S.D.N.Y. Jan. 26, 1999). The Defendants have, among other things, made repeated requests for adjournment, moved to allow counsel for Rendall and Campbell to withdraw from representing thin in this matter, and in countenanced Rendall's pro se efforts to

preclude discovery regarding his personal financial information and to amend his Answer. *See In re Petition of Shavit*, 197 B.R. 763, 769 (S.D.N.Y. 1996) (granting petitioner's motion voluntarily to dismiss without prejudice and nothing that "the Debtors were not forthcoming with their responses to the Petitioner's interrogatories" and thereby "created an obstacle to the Petitioner's. . .decision whether to proceed or dismiss");

4. The parties have, thus far, engaged in only limited discovery, largely because of Defendants' delays. Letter from Rendall to the Court, dated January 23, 2002, at 2 ("[d]iscovery by plaintiffs is in the early stages"); *Saatchi Gallery*, 1999 WL 33464, at *1 (granting motion voluntarily to dismiss without prejudice where "Defendants [had] not sought discovery" and "other than correspondence, Court conferences, and defendants' answer," the action had "not progressed");

5. Neither Plaintiffs nor the Individual Defendants have suggested that attorneys' fees should be awarded, nor is such an award appropriate. *See Read Corp. v. Bibco Equipment Co., Inc.*, 145 F.R.D. 288, 290 (D.N.H. 1993) ("[A]n award of attorneys fees is [only] appropriate when an action is dismissed without prejudice, and subject to relitigation, in order to reimburse defendant for expenses incurred in preparing work produce that cannot be used in serenading the resurrected cause of action.") (citations and quotation marks omitted);

6. Granting Plaintiffs' motion to voluntarily dismiss does not prejudice and would leave Rendall free to "pursue in a separate action any claims, if any, he may have." Order, dated April 12, 2002. As discussed more fully below, Rendall's latest application to amend his Answer is, among other things, non-specific, and borders on being incoherent and frivolous, see ¶ 8 below. It is not even clear that this would be an appropriate forum for Rendall to bring any claims he may have since he apparently has

grievances against the Securities and Exchange Commission, and other unnamed "competitors" and "short sellers" who are not parties in this case. See e.g., ¶ 10 below;

7. Plaintiffs' rationale for their request to dismiss this case -- that the Individual Defendants lack the financial resources to satisfy a potential judgment -- is appropriate. *See In re Petition of Shavit*, 197 B.R. at 769 (plaintiff "could at best achieve an expensive Pyrrhic victory"). As noted, Solv-Ex filed for bankruptcy on August 1, 1997 and Plaintiffs' claims against Solv-Ex here were dismissed with prejudice on June 25, 1999, and the Individual Defendants, most of whom agree with the dismissal with prejudice on June 25, 1999, have limited liquid assets.

8. Rendall's (further) application for leave to amend his Answer should be denied without prejudice. *See* Order, dated July 11, 2001 ("Defendant [Rendall] has already received more than enough extensions of time to answer this 1996 complaint and to prepare his defenses and counterclaims. The current counterclaim will serve only to further lengthen this already fiver year old case.") Rendall's allegations -- e.g. "[t]hese claims were against plaintiffs. . .for conspiracy with the competitors and short sellers [and the Securities and Exchange Commission] to destroy Solv-Ex Corporation and this Defendant [Rendall]" -- are non-specific and border on incoherent and frivolous, *see Prezzi v. Scheiter*, 469 F.2d 691 (2d Cir. 1971) (leave to amend denied where claim was "a labyrinthian prolixity of unrelated and vituperative charges that defied comprehension"). Also, Rendall, as pro se litigant, is not an appropriate representative of a class, *McLeod v. Crossan*, No. 89 Civ. 1952, 1989 WL 28416, at *1 (S.D.N.Y. Mar. 21, 1989) ("It is well settled in this circuit that pro se plaintiffs cannot act as class representatives."). Further, it seems hugely inappropriate for a defendant corporate officer, such as Rendall, to seek to either represent and/or litigate against his former

shareholders who are Plaintiffs, see Fed. R. Civ. P. 23(a) (In order to certify a class action, among other things, "the claims of defenses of the representative parties [must be] typical of the claims or defenses of the class"); *In Re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (Typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove defendant's liability.");

9. This action "was brought on behalf of purchasers of Solv-Ex stock claiming that they purchased Solv-Ex at an artificially inflated price [by, among other things, the very actions of Mr. Rendall and others as corporate insiders]." Pls.' Reply Mem. at 2. Plaintiffs alleged, among other things. that Rendall knew that "commercial production would not be scheduled to begin until July 2002 at the earliest. . .[y]et, throughout the Class Period. [] consistently made false and misleading statements that commercial oil production from its tar sands leases in Alberta would commence by late 1996 or early 1997 at the latest." Complaint ¶ 138. "Mr. Rendall's suggestion that the stock price was artificially depressed is altogether different claim." Pls.' Reply Mem. at 2; *see World Wide Communications, Inc. v. Mark Rozar, et al.*, No. 96 Civ. 1056, 1998 WL 249184, at *4 (S.D.N.Y. May 15, 1998) ("It is simply too late in the case to allow [defendant] to assert a new and unrelated counterclaim");

10. Rendall would assert claims against individuals and entities who are not specified, much less currently parties to this matter. Rendall's Reply Mem. at 4 (Plaintiffs conspired "with the competitors and short sellers to destroy Solv-Ex Corporation and this Defendant [Rendall]"). This would clearly prejudice Plaintiffs. *See Clay v. Martin*, 509 F.2d 109, 113 (2d Cir. 1975) (leave should be denied where it shall cause "undue delay or prejudice to the opposing party");

11. At least some of Rendall's "claims" against individuals and entities that are not parties to this matter, i.e., the "short sellers" and "competitors" and Securities and Exchange Commission, are legally insufficient, even under a liberal (pro se) reading of his submissions. *See* Answer, filed December 13, 2000, at 23 ("The plaintiff[s'] attorney(s) worked with the short sellers of Solv-Ex Corporation common stock, the Compan[y's] (Solv-Ex Corporation) [] competitors and the SEC (Securities and Exchange Commission) to unlawfully destroy Solv-Ex by reducing the value of its common stock during the class period and subsequently." *Feldman v. Liftor*, 64 F.R.D. 539, 543 (S.D.N.Y. 1974) (leave to amend should be denied "where [the party's] proposed amendment advances a claim or defense that is legally insufficient on its factor otherwise clearly without merit"); *see Trice v. Clark*, 131 F.3d 132, 1997 WL 738116, at *1 (2d Cir. Nov. 24, 1997) (leave to amend denied where plaintiff advanced "only vague, conclusory allegations of wrongdoing" by defendants); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1127 (2d Cir. 1994) (Section 10(b) claim dismissed where plaintiff failed to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements where made, and (4) explain why the statements were fraudulent." (citations omitted);

12. As to Rendall's malicious prosecution charges, "a claim in the nature of malicious prosecution, which arises out of the bringing of the main action, generally cannot be asserted either as a compulsory or a permissive counterclaim, since such a claim is premature prior to the determination of the main action." *Harris v. Steinem*, 571 F.2d 119, 124 (2d Cir. 1978) (citations omitted);

13. Under the Court's Order, dated April 12, 2002, Rendall is free to pursue any claim(s) he may have in a (separate) civil suit in an appropriate forum. He is advised, strongly, once again, to retain counsel because, as the Court has

previously cautioned, these are very complex issues. *See* Transcript, dated January 22, 2001, at 8 ("This is one of the dangers to having pro se representation, it seems to me, and that is that you may not be well versed in the procedures and the laws that apply.");

14. No ex-shareholders have moved to intervene in this matter. *See United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70-71, 73 (2d Cir. 1994) (post-judgment intervention denied as untimely under multi-factor analysis). Mr. Phillips, presumably on behalf of the ex-shareholders who have contacted him, has not even moved to be admitted before the Court pro hac vice and such ex-shareholders do not oppose Plaintiffs' motion. *See* N.Y. Judiciary Law § 478 (McKinny 1996) (Under New York law, it is "unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court. . .without having first duly and regularly licensed and admitted to practice law in the courts. . ."). Indeed, Mr. Phillips would likely be disqualified from representing the ex-shareholders because of conflicts. *See Papanicolanu v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080, (S.D.N.Y. 1989) (Attorneys who violate "Canon 4 (of the ABA Code of Professional Responsibility], for example, by successively representing opposing sides of an ongoing dispute," are "paradigmatic candidates for disqualification" since "the attorney is in a position to use the confidences gained through prior conferences with a former client.");

15. As noted in the Court's Order, dated April 12, 2002, ex-shareholders may retain lawyers and are free to pursue claims, if any, they may have.

IV. Conclusion.

For the foregoing reasons, Rendall's motion for reconsideration is granted in part and denied in part. The Court's Order, dated April

12, 2002 [102], is hereby amended to incorporate additional findings of fact and conclusions of law. Within ten business days of this date, Plaintiffs' counsel, Messrs. Milberg, Weiss, Bershad, Hynes & Lerach, LLP, and Messrs. Wechsler, Harwood, Halebian & Feffer, LLP, are directed to cause a copy of this Amended Order of Dismissal to be mailed to those shareholders of Solv-Ex who have written to such counsel or to the Court on or before April 12, 2002. Plaintiffs' counsel is also directed to comply with the remaining notice (publication) provisions of the Order, dated April 12, 2002, within 10 business days of this date.

The clerk is respectfully requested to close this case Nos. 96 Civ. 7575 and 96 Civ. 8744.

Dated: New York, New York
April 30, 2002

s/RMB

Richard M. Berman, U.S.D.J.

APPENDIX C

198 F.Supp. 2d 587 (S.D.N.Y 2002)

In re SOLV-EX CORPORATION SECURITIES LITIGATION.

No. 96 Civ. 7575 (RMB)

United States District Court,
S.D. New York.

April 30, 2002.

Officer of corporation filed motion for reconsideration of order dismissing with prejudice shareholders' action against corporation and its officers for allegedly making false and misleading statements that commercial oil production from corporation's tar sands leases in Canada would soon commence, inducing shareholders to purchase shares at an artificially inflated price. The district court, Berman J., held that: (1) there was sound basis to dismiss with prejudice shareholders' class action against corporation and its officers; (2) Corporation's officer, as self appointed shareholder class representative, did not state valid counterclaim in shareholders' securities fraud action.

Motion granted in part and denied in part.

1. Federal Civil Procedure 928

Motions for reconsideration are within the sound discretion of the district court.

2. Federal Civil Procedure 928

Motions for reconsideration must demonstrate that the court overlooked controlling decisions or factual matters that were put before on the underlying motion that might reasonably be expected to alter the conclusion reached by the court on the underlying motion.

3. Federal Civil Procedure 928

A motion for reconsideration is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved. U.S. Dist. Ct. Rules S.D.N.Y., Rule 6.3.

4. Federal Civil Procedure 1700, 1713.1

There was sound basis to voluntarily dismiss without prejudice shareholders' class action against corporation and its officers alleging that officers made false and misleading statements that commercial oil production from corporation's tar sands leases in Canada would soon commence, inducing shareholders to purchase shares at an artificially inflated price; corporation declared bankruptcy, and individual defendants could not satisfy a potential judgment, no class had been certified, two of the three individual defendants did not oppose dismissal, and no prejudice was shown. Securities and Exchange Act § 10(b), 15 U.S.C.A. § 78j(b); Fed. Rules Civ. Proc. Rule 41(a)(2), 28 U.S.C.A.

5. Federal Civil Procedure 847

Corporation's officer, as self appointed shareholder class representative, was not entitled to amend answer to assert counterclaim in shareholders' securities fraud action; officer's allegation that "claims were against shareholders for conspiracy with competitors and short sellers, and the Securities and Exchange Commission (SEC)" to destroy corporation and officer were non-specific, officer as pro-se litigant could not act as class representative, and it was inappropriate for officer to represent shareholders, who were plaintiffs in action against corporation and officer. Securities Exchange Act § 10(b), 15 U.S.C.A. § 78j(b).

6. Malicious Prosecution 34

Claim in the nature of malicious prosecution, which arises out of the bringing of the main action, generally cannot be asserted either as a compulsory or a permissive counterclaim, since such a claim is premature prior to the determination of the main action.

Milberg Weiss Bershad Hynes & Lerach LLP and Wechsler Harwood Halebian & Feffer LLP, New York City for Plaintiff.

John S. Rendall, Pro se.

Herbert M. Campbell, III, Pro se.

Louis Solomon New York City, for defendant W. Jack Butler.

AMENDED ORDER OF DISMISSAL

Berman, District Judge

I. Background.

By Order, dated April 12, 2002 ("Order"), the Court, among other things, granted Plaintiffs' application and dismissed this matter without prejudice pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 41(a)(2), and denied *pro se* Defendant John S. Rendall's ("Rendall") (further) application, dated January 23, 2002, for leave to amend his Answer without prejudice to his pursuing in a separate action any claims, if any, he may have. *See* Order attached hereto. On or about April 16, 2002, Rendall moved for reconsideration of the Order, pursuant to Local Civil Rule 6.3 of the Southern District of New York ("Rendall's Mem."), and requested further "Findings of fact to support the Conclusions of Law." Rendall's Mem. at 3. On April 19, 2002, Plaintiffs opposed Rendall's application for reconsideration and, on April 23, 2002, Rendall submitted a reply memorandum ("Rendall's reply Mem."). **For the following reasons, Rendall's motion is granted in part and denied in part.**

II. Standard of Review.

[1-3] Motions for reconsideration are governed by Local Civil Rule 6.3 and are within the sound discretion of the district court. *Schaffer v. Soros*, No. 92 Civ. 1233, 1994 WL 592891, at *1 (S.D.N.Y. Oct. 31, 1994); *See System Management Arts, Inc. v. Avesta Tech, Inc.*, 106 F.Supp.2d 519, 521 (S.D.N.Y. 2000). "[T]he motions must demonstrate that the court overlooked controlling decisions or factual matters that were put before it on

the underlying motion that might reasonably be expected to alter the conclusion reached by the court on the underlying motion." *Stoner v. New York City Ballet Co.*, No. 99 Civ. 0196, 2002 WL 523270, at *2 (S.D.N.Y April 8, 2002) (citing *Dellefave v. Access Temporaries, Inc.*, No. 99 Civ. 6098, 2001 WL 286771, at *1 (S.D.N.Y. Mar. 22, 2001)). A Rule 6.3 motion is "not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *In re Houbigant, Inc.*, 914 F.Supp. 997, 1001 (S.D.N.Y. 1996). Even where, as here, these bases for reconsideration are not present, courts have written to clarify their prior ruling. *See, e.g., Von Schmidt v. Kratter*, 9 F.Supp. 2d 100, 104 (D.Conn. 1997).

III. Analysis.

The court here clarifies the Order by amplifying and supplementing its prior findings of fact and conclusions of law.[1]

The Order was based upon the record of these proceedings, including, among other things, the oral argument held April 12, 2002 and the prior submissions of the parties; Plaintiffs' Memorandum of Law, dated March 1, 2002, in support of their motion voluntarily to dismiss this action without prejudice ("Pls.' Mem."); and Rendall's Memorandum of Law, dated March 22, 2002, in opposition to that motion ("Rendall's Opp. Mem.").

Rendall's Mem. presents a helpful suggestion that the Court clarify and expand upon its Order to include additional findings of fact and conclusions of law. *See Mattel, Inc. v. Robarb's, Inc.*, No. 00 Civ. 4866, 2001 WL 797478, at *2 (S.D.N.Y. July 12, 2001) ("Reconsideration is granted in part solely to clarify the reasoning supporting the Court's holding. . ."). The Court, in addition to previous findings of fact and conclusions of law, finds the following in support of it's earlier determination:

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[1] The Court incorporates by reference, among the other things the prior proceedings herein, prior findings of fact and conclusions of law, and the record of the proceedings held April 12, 2002.

1. No motion for class certification has been filed and no class has been certified;

2. Plaintiffs had purchased shares of Solv-Ex Corporation ("Solv-Ex") between February 15, 1995 and September 30, 1996 ("Class Period") and commenced this action in the Fall of 1996 (as a putative class action) against, among others, Solv-Ex and certain of its officers and directors, including Rendall, as Chief Executive Officer and Chairman of the Board of Solv-Ex, Herbert M. Campbell, III, Senior Vice-President and Secretary ("Campbell"), and W. Jack Butler, President ("Butler") (collectively the "Individual Defendants");

3. During the Class period, Solv-Ex purported to be "in the process of implementing a project to commence mining operations and to construct a commercial oil extraction and refining plant and an accompanying mineral co-production plant facility in Alberta, Canada." Second Consolidated Amended Class Action Complaint, dated July 21, 1997, ¶ 2. Plaintiffs alleged that "although (Solv-Ex) repeatedly represented throughout the Class Period that the Alberta Project was on track to begin commercial oil production by late 1996 or early 1997, unbeknownst to investors, Solv-Ex was represented in Alberta Energy and Utilities Board "during the Class Period that it was constructing only an 'experimental plant'" Id. ¶ 7. Plaintiffs further alleged, among other things, that Reuters News Service quoted Rendall as stating that "construction of the $150 million plant would be completed in December [1996]" and that "[t]he technology patented by Solv-Ex had worked in the pilot plant." Id. ¶ 118;

4. On December 17, 1996, The Court (Preska, J.) consolidated the action styled *Sedita v. Solv-Ex Corp., et al.*, 96 Civ. 7575 with the action styled *Grossman v. Butler, et al.*, 96 Civ. 8744;

5. By Order, dated December 17, 1996, the Court (Preska, J.) appointed Lead Plaintiffs in this action and approved the Lead Plaintiffs' selection of Milberg, Weiss, Bershad, Hynes & Lerach, LLP and Wechsler, Harwood, Halebian & Feffer, LLP as Co-Lead Counsel.

6. Plaintiffs filed their Second Consolidated Amended Class Action Complaint ("Complaint") on or about July 21, 1997;

7. The Individual Defendants, who were initially represented by counsel, sought and received (no less than) twelve extensions of time to answer the Complaint;

8. On or about August 1, 1997, Solv-Ex filed for bankruptcy in the United States Bankruptcy Court for the District of New Mexico. By Order, dated June 25, 1999, the Court dismissed Plaintiffs' claims against Solv-Ex with prejudice. Order, dated June 25, 1999, at 1; see Solv-Ex Corporation's Amended Plan of Reorganization, dated June 23, 1998, Article VIIa, Article IX §§ 9.1, 9.3, 9.4 ("all Persons who have held, hold or may hold Claims. . .are permanently enjoined. . .from (i) commencing or continuing in any manner or action or other proceeding of any kind with respect to any such Claim against. . .Solv-Ex. . .").

9. On July 27, 1999, the Individual Defendants moved, by their counsel, to dismiss the Complaint pursuant to Fed. R. Civ. P. 9(b) and 12(b)(6). While the Individual Defendants' motion to dismiss the Complaint was pending, all discovery was stayed. See 15 U.S.C. § 78u-4(b)(3) (Private Securities Litigation Reform Act);

10. On September 6, 2000, the Court denied the Individual Defendants' motion to dismiss. Order, dated September 6, 2000 at 10, 12 (Plaintiffs "have adequately alleged facts that constitute strong circumstantial evidence of conscious

misbehavior or recklessness by defendants" under Section 10(b) ("Section 10(b)") of the Securities and Exchange Act of 1934 as amended, 15 U.S.C.A. § 78j(b) ("Exchange Act") and "have met their [] pleading burden" under Section 20(a) of the Exchange Act. 15 U.S.C. § 78t(a).);

11. In a letter to the Court, dated September 19, 2000, Stuart T. Rebish, Esq. of Shiff & Tisman, counsel for Solv-Ex, Rendall, and Campbell, wrote that "[o]ur statements for services rendered, some as early as September 1999, remain unpaid, and have expended additional time for which we have not yet submitted a bill. **Messrs. Rendall and Campbell have informed us that they are unable to pay us what we are owed, and that they cannot pay us for future services.**" (emphasis added). In a letter to the Court, dated September 21, 2000, John D. Phillips, Esq,. co-counsel for Solv-Ex, Rendall and Campbell, wrote: "Both Messrs. Rendall and Campbell have informed me that they cannot pay counsel for any services, past or future, rendered in their defense."[2] The Court, reluctantly, permitted Messrs. Rebish and Phillips to with draw from the action and, mindful of the complexity of the issues involved, nevertheless allowed Messrs. Rendall and Campbell to proceed pro se. *See* Transcript, dated November 9, 2000, at 4 (The Court "worried about people's ability [acting pro se] to protect and vindicate their rights.");

12. Defendant Campbell is a lawyer and was General Counsel to Solv-Ex. Defendant Rendall is not a lawyer;

13. On or about December 13. 2000, Rendall filed his Answer. It purported to include a counterclaim against shareholder Plaintiffs and their attorneys. Answer at 22-23 ("Rendall requests plaintiff[s'] counsel. . .be made

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[2] As discussed more fully below, Mr. Phillips no longer represents Solv-Ex, Rendall, and Campbell but, somewhat surprisingly, has recently contacted the court on behalf of approximately twenty-five former shareholders of Solv-Ex. See paragraphs 24, 26, 28-30.

involuntary party plaintiffs, and that the allegations set out in this counterclaim be asserted against them as the primary wrongdoers, or, as jointly and severally liable with the named plaintiffs for the damages suffered by Defendant Rendall.");

14. On February, 14 2001, at a conference held with the Court, Plaintiffs' counsel and Rendall discussed with the Court issues regarding Rendall's counterclaim including a possible motion to dismiss the counterclaim. *See* Transcript, dated February 14, 2001; *see also* Rendall's Proposed Stipulation, dated February 6, 2001 ("It is hereby stipulated. . .that the counterclaims contained in the Answer. . .are hereby withdrawn without prejudice. . ."). Plaintiffs and Rendall did not agree upon Rendall's suggestion that the statute of limitations for his counterclaim be tolled. Id. at 4;

15. At the February 14, 2001 conference, the Court granted Rendall's request to amend his Answer and set a briefing schedule for Plaintiffs, thereafter, to move to dismiss Rendall's counterclaim. Id. at 11-12 (Rendall was directed to serve and file an amended Answer by February 26, 2001 and Plaintiffs were to file their motion to dismiss by March 20, 2001);

16. On February we, Coo1, three days before Rendall's amended Answer was due to be filed with the Court, **upon the stipulation of Rendall and Plaintiffs' Co-Lead Counsel**, Messrs. Wechsler, Harwood, Halebian & Feffer, LLP and Milberg, Weiss, Bershad, Hynes & Lerach, LLP, the court ordered the withdrawal of Rendall's counterclaims without prejudice. Order, dated February 23, 2001, at 1 ("the counterclaims. . .are hereby withdrawn without prejudice");

17. On May 31, 2002, respectively, in response to letters received by the Court from persons identifying themselves as former shareholders of Solv-Ex, the Court issued orders

advising that "this action has not been certified as a class action." Order, dated May 31, 2001, and that "such shareholders should be aware that they are also (and have been throughout this proceeding) free to pursue their choosing." Order, dated January 31, 2003. Copies of these orders were mailed to those persons who had written to the court;

18. In or about June 2001, Plaintiffs sought: discovery of additional financial information to determine whether the remaining Individual Defendants, i.e., Messrs. Rendall, Campbell, and Butler, had the financial resources to satisfy a potential judgment in this action if the case were to advance to trial and judgment;

19. On June 26, 2001, Rendall requested leave to amend his Answer to include his previously withdrawn counterclaims, and to include claims against Plaintiffs, Plaintiffs' attorneys, and presumable many unnamed "competitors" and "short sellers" and the Securities and Exchange Commission. Rendall's Mem. at 2 ("the plaintiff[s'] attorney(s) worked with the short sellers of Solv-Ex Corporation common stock, the Company[s'] (Solve-Ex Corporation) [] competitors, and the Securities and Exchange Commission to unlawfully stop the financing efforts of Solv-Ex Corporation, and thereby caused it to file for Chapter 11 bankruptcy protection. . ."). The Court denied Rendall's request by Order, dated July 11, 2001 and by Memo Endorsed Order, dated July 23, 2001. *See* Order, dated July 11, 2001, at 9 ("Mr. Rendall has not presented any new facts to support repleading the dismissed counterclaim. . .Defendant has already received more than enough extensions of time to answer this 1996 complaint and to prepare his defenses and counterclaims. The current counterclaim will serve only to further lengthen this already five year old case.") (emphasis in original) (citation omitted);

20. Defendant Rendall resisted the additional discovery referred to in paragraph eighteen above. After a conference before Magistrate Judge Ronald L. Ellis on October 15, 2001, Plaintiffs were permitted to serve the Individual Defendants with their discovery requests;

21. On November 1, 2001, Rendall moved for a protective order precluding additional financial discovery and, on November 14, 2001, Magistrate Ellis denied Rendall's motion and ordered Rendall to respond to Plaintiffs' discovery requests by November 23, 2001. Order, dated November 23, 2001. On November 26, 2001, Rendall filed objections to Magistrate Ellis' Ruling. On January 9, 2002, the Court affirmed Magistrate Ellis' ruling and concluded that Rendall "failed to show good cause to justify an order of protection" precluding discovery of his finances. Order, dated January 9, 2002, at 1 (quoting Order, dated November 14, 2001). On January 18, 2002, Rendall responded to Plaintiffs' discovery requests; on January 22, 2002 Campbell served his response; and on February 15, 2002, Butler served his response. The financial disclosures of the Individual Defendants, according to the Plaintiffs, showed that they had "limited liquid assets." Pls.' Mem. at 5;[3]

22. On January 23, 2002, Rendall (again) applied for leave to amend his Answer to assert counterclaims purportedly as a class representative. *See* Letter to the Court, dated January 23, 2002 ("John S. Rendall asserts these claims of [No.] 96 Civ. 6057 [*Solv-Ex Corp. v. Parker Quillen, et al.*, which were dismissed without prejudice on July 31, 1997,] as belonging to him and others so situated (class members) in [No.] 96 Civ. 7575") Transcript, dated April 12, 2002, at 27-28 ("the wrongful conduct was tort, antitrust, malicious use of process:);

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[3] It should be noted that Rendall has asserted that while he has limited liquid assets, he has "several hundred million" dollars in intellectual property. See e.g., Transcript, dated February 1, 2002, at 6; Transcript, dated April 12, 2002, at 24-25.

23. On March 1, 2002, Plaintiffs filed a motion voluntarily to dismiss this matter as against the Individual Defendants without prejudice, pursuant to Fed. R. Civ. P. 41(a)(2), and opposed Rendall's request for leave to amend his Answer. Following the financial discovery referred to in paragraph eighteen above, Plaintiffs had concluded that the Individual Defendants "do not have the financial resources to satisfy a potential judgment in this action, and [] continued pursuit of this action through long and costly proceedings would result, at best, in a hollow victory for the Plaintiffs and the putative class." Pls.' Mem. at 1;

24. Individual Defendants Campbell and Butler did not oppose Plaintiffs' motion voluntarily to dismiss this matter. Nor did Mr. Phillips "oppose" Plaintiffs' motion on behave of the approximately 25 ex-shareholders of Solv-Ex who had contacted him. Transcript, dated April 12, 2002, at 35 (Mr. Phillips stated that these ex-shareholders "are certainly not opposed to the dismissal of the claims against the individual named defendant:); *see* Letter to the Court, dated April 5, 2002;

25. Only Rendall opposed Plaintiffs' motion. On March 22, 2002, Rendall submitted a memorandum of law in opposition to Plaintiffs' motion voluntarily to dismiss and in support of his (further) application to amend his Answer. Transcript, dated April 12, 2002, at 27 (Rendall stated that Plaintiffs "filed the complaint. . .to damage me. And the wrongful conduct was tort, antitrust, malicious use of process. They [Plaintiffs] worked in [conspiracy] with others to destroy Solv-Ex.") On April 5, 2002, Plaintiffs submitted a reply memorandum responding to Rendall's opposition ("Pls.' Reply Mem.");

26. On April 12, 2002, oral argument was held on Plaintiffs' motion voluntarily to dismiss this matter and Rendall's opposition and (further) application for leave to amend his Answer. *See* Transcript, dated April 12, 2002. Attendees

included Plaintiffs' Co-Lead Counsel, Messrs. Wechsler, Harwood, Halebian & Feffer, LLP and Milberg, Weiss, Bershad, Hynes & Lerach, LLP, Individual Defendant Butler's Counsel, Louis Soloman, Esq., Individual Defendant Rendall, Mr. Phillips, and Defendant Rendall's brother, David Rendall.

27. Rendall does not contest that he lacks the financial resources to satisfy a potential judgment by Plaintiffs; *see* Transcript, dated April 12, 2002, at 24-25 ("I am not making the claim that I have the resources to satisfy a judgment.");

28. Mr. Phillips' role in this proceeding in unclear. Originally, as noted, he was co-counsel to Solv-Ex, Rendall, and Campbell. At the oral argument, Mr. Phillips "appeared" on behalf of former shareholders of Solv-Ex but acknowledged that, since he had previously represented Solv-Ex, Rendall, and Campbell in this matter, he "would have grave problems representing [these] other shareholders seeking to intervene as members within [the proposed] class. . .and [] would never seek to do that [because of] a conflict interest." Transcript, dated April 12, 2002, at 35. Indeed, Mr. Phillips, who is not a member of the bar of the Southern District of New York, *see* id, at 33-34, did not (even) seek pro hac admission for the April 12, 2002 proceeding pursuant to Local Rule 1.3 U.S. Dist. Ct. Rules S. & E.D.N.Y., Civil Rule 1.3 (2001); *see* Memo Endorsed Order, dated April 9, 2002 ("Please check the FRCP [Federal Rules of Civil Procedure] & Local Rules [of the Southern District of New York] regarding what appropriate role you may play. Subject to that, you are more than welcome.");

29. At the oral argument, Mr. Phillips also expressed the view that these ex-shareholders who had contacted him "are certainly not opposed to the dismissal of the claims against the individual named defendants. . ." Transcript, dated April 12, 2002, at 35;

30. By letter to the Court, dated April 23, 2002, Mr. Phillips, purportedly on behalf of ex-shareholders, stated that these ex-shareholders "support" Rendall's request for reconsideration. Letter to Court, dated April 23, 2002, at 2;

31. None of the ex-shareholders of Solv-Ex who wrote to the court or who are in contact with Mr. Phillips have sought to intervene pursuant to Fed. R. Civ. P. 24. See Letter to the Court from Robert A. Wallner, Esq,. dated April 26, 2002.

CONCLUSIONS OF LAW

[4-6] 1. There is a sound basis to dismiss this matter without prejudice since Solv-Ex has already been dismissed from this matter with prejudice, the Individual Defendants cannot satisfy a potential judgment in this action, no class has been certified, two of the three Individual Defendants do not oppose dismissal, and no prejudice has been shown. *Guzman v. Hazemag U.S.A., Inc.*, 145 F.R.D. 308, 309 (E.D.N.Y. 1993) ("[T]he presumption in this circuit is that a court should grant a dismissal pursuant to [Rule] 41 (a)(2) absent a showing that the defendants will suffer substantial prejudice as a result.");

2. As noted, Individual Defendants Campbell and Butler do not oppose Plaintiffs' motion. Rendall's contentious that he may be prejudiced, respectfully, have no merit. Indeed, it is the Plaintiffs who would be prejudice if Rendall's "claims" are allowed to go forward here;

3. There has not been any undue vexatiousness by Plaintiffs. If anything, Defendants have slowed things down. *Saatchi Gallery v. Gorney*, No. 98 Civ. 4542, 1999 WL 33464, at *1 (S.D.N.Y. Jan. 26, 1999). The Defendants have, among other things, made repeated requests for

adjournment, moved to allow counsel for Rendall and Campbell to withdraw from representing thin in this matter, and in countenanced Rendall's pro se efforts to preclude discovery regarding his personal financial information and to amend his Answer. *See In re Petition of Shavit*, 197 B.R. 763, 769 (S.D.N.Y. 1996) (granting petitioner's motion voluntarily to dismiss without prejudice and nothing that "the Debtors were not forthcoming with their responses to the Petitioner's interrogatories" and thereby "created an obstacle to the Petitioner's. . .decision whether to proceed or dismiss");

4. The parties have, thus far, engaged in only limited discovery, largely because of Defendants' delays. Letter from Rendall to the Court, dated January 23, 2002, at 2 ("[d]iscovery by plaintiffs is in the early stages"); *Saatchi Gallery*, 1999 WL 33464, at *1 (granting motion voluntarily to dismiss without prejudice where "Defendants [had] not sought discovery" and "other than correspondence, Court conferences, and defendants' answer," the action had "not progressed");

5. Neither Plaintiffs nor the Individual Defendants have suggested that attorneys' fees should be awarded, nor is such an award appropriate. *See Read Corp. v. Bibco Equipment Co., Inc.*, 145 F.R.D. 288, 290 (D.N.H. 1993) ("[A]n award of attorneys fees is [only] appropriate when an action is dismissed without prejudice, and subject to relitigation, in order to reimburse defendant for expenses incurred in preparing work produce that cannot be used in serenading the resurrected cause of action.") (citations and quotation marks omitted);

6. Granting Plaintiffs' motion to voluntarily dismiss does not prejudice and would leave Rendall free to "pursue in a separate action any claims, if any, he may have." Order, dated April 12, 2002. As discussed more fully below, Rendall's latest application to amend his Answer is, among other things, non-specific, and borders on being

incoherent and frivolous, see ¶ 8 below. **It is not even clear that this would be an appropriate forum for Rendall to bring any claims he may have since he apparently has grievances against the Securities and Exchange Commission, and other unnamed "competitors" and "short sellers" who are not parties in this case.** See e.g., ¶ 10 below;

7. Plaintiffs' rationale for their request to dismiss this case -- that the Individual Defendants lack the financial resources to satisfy a potential judgment -- is appropriate. *See In re Petition of Shavit*, 197 B.R. at 769 (plaintiff "could at best achieve an expensive Pyrrhic victory"). As noted, Solv-Ex filed for bankruptcy on August 1, 1997 and Plaintiffs' claims against Solv-Ex here were dismissed with prejudice on June 25, 1999, and the Individual Defendants, most of whom agree with the dismissal with prejudice on June 25, 1999, have limited liquid assets.

8. Rendall's (further) application for leave to amend his Answer should be denied without prejudice. *See* Order, dated July 11, 2001 ("Defendant [Rendall] has already received more than enough extensions of time to answer this 1996 complaint and to prepare his defenses and counterclaims. The current counterclaim will serve only to further lengthen this already fiver year old case.") Rendall's allegations -- e.g. "[t]hese claims were against plaintiffs. . .for conspiracy with the competitors and short sellers [and the Securities and Exchange Commission] to destroy Solv-Ex Corporation and this Defendant [Rendall]" -- are non-specific and border on incoherent and frivolous, *see Prezzi v. Scheiter*, 469 F.2d 691 (2d Cir. 1971) (leave to amend denied where claim was "a labyrinthian prolixity of unrelated and vituperative charges that defied comprehension"). Also, Rendall, as pro se litigant, is not an appropriate representative of a class, *McLeod v. Crossan*, No. 89 Civ. 1952, 1989 WL 28416, at *1 (S.D.N.Y. Mar. 21, 1989) ("It is well settled in this circuit that pro se plaintiffs cannot act as class

representatives."). Further, it seems hugely inappropriate for a defendant corporate officer, such as Rendall, to seek to either represent and/or litigate against his former shareholders who are Plaintiffs, see Fed. R. Civ. P. 23(a) (In order to certify a class action, among other things, "the claims of defenses of the representative parties [must be] typical of the claims or defenses of the class"); *In Re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992) (Typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove defendant's liability.");

9. This action "was brought on behalf of purchasers of Solv-Ex stock claiming that they purchased Solv-Ex at an artificially inflated price [by, among other things, the very actions of Mr. Rendall and others as corporate insiders]." Pls.' Reply Mem. at 2. Plaintiffs alleged, among other things. that Rendall knew that "commercial production would not be scheduled to begin until July 2002 at the earliest. . .[y]et, throughout the Class Period. [] consistently made false and misleading statements that commercial oil production from its tar sands leases in Alberta would commence by late 1996 or early 1997 at the latest." Complaint ¶ 138. "Mr. Rendall's suggestion that the stock price was artificially depressed is altogether different claim." Pls.' Reply Mem. at 2; *see World Wide Communications, Inc. v. Mark Rozar, et al.*, No. 96 Civ. 1056, 1998 WL 249184, at *4 (S.D.N.Y. May 15, 1998) ("It is simply too late in the case to allow [defendant] to assert a new and unrelated counterclaim");

10. Rendall would assert claims against individuals and entities who are not specified, much less currently parties to this matter. Rendall's Reply Mem. at 4 (Plaintiffs conspired "with the competitors and short sellers to destroy Solv-Ex Corporation and this Defendant [Rendall]"). This would clearly prejudice Plaintiffs. *See Clay v. Martin*, 509 F.2d 109, 113 (2d Cir. 1975) (leave

should be denied where it shall cause "undue delay or prejudice to the opposing party");

11. At least some of Rendall's "claims" against individuals and entities that are not parties to this matter, i.e., the "short sellers" and "competitors" and Securities and Exchange Commission, are legally insufficient, even under a liberal (pro se) reading of his submissions. *See* Answer, filed December 13, 2000, at 23 ("The plaintiff[s'] attorney(s) worked with the short sellers of Solv-Ex Corporation common stock, the Compan[y's] (Solv-Ex Corporation) [] competitors and the SEC (Securities and Exchange Commission) to unlawfully destroy Solv-Ex by reducing the value of its common stock during the class period and subsequently." *Feldman v. Liftor*, 64 F.R.D. 539, 543 (S.D.N.Y. 1974) (leave to amend should be denied "where [the party's] proposed amendment advances a claim or defense that is legally insufficient on its factor otherwise clearly without merit"); *see Trice v. Clark*, 131 F.3d 132, 1997 WL 738116, at *1 (2d Cir. Nov. 24, 1997) (leave to amend denied where plaintiff advanced "only vague, conclusory allegations of wrongdoing" by defendants); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1127 (2d Cir. 1994) (Section 10(b) claim dismissed where plaintiff failed to "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements where made, and (4) explain why the statements were fraudulent." (citations omitted);

12. As to Rendall's malicious prosecution charges, "a claim in the nature of malicious prosecution, which arises out of the bringing of the main action, generally cannot be asserted either as a compulsory or a permissive counterclaim, since such a claim is premature prior to the determination of the main action." *Harris v. Steinem*, 571 F.2d 119, 124 (2d Cir. 1978) (citations omitted);

13. Under the Court's Order, dated April 12, 2002, Rendall is free to pursue any claim(s) he may have in a (separate) civil suit in an appropriate forum. He is advised, strongly, once again, to retain counsel because, as the Court has previously cautioned, these are very complex issues. *See* Transcript, dated January 22, 2001, at 8 ("This is one of the dangers to having pro se representation, it seems to me, and that is that you may not be well versed in the procedures and the laws that apply.");

14. No ex-shareholders have moved to intervene in this matter. *See United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70-71, 73 (2d Cir. 1994) (post-judgment intervention denied as untimely under multi-factor analysis). Mr. Phillips, presumably on behalf of the ex-shareholders who have contacted him, has not even moved to be admitted before the Court pro hac vice and such ex-shareholders do not oppose Plaintiffs' motion. *See* N.Y. Judiciary Law § 478 (McKinny 1996) (Under New York law, it is "unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court. . .without having first duly and regularly licensed and admitted to practice law in the courts. . ."). Indeed, Mr. Phillips would likely be disqualified from representing the ex-shareholders because of conflicts. *See Papanicolanu v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080, (S.D.N.Y. 1989) (Attorneys who violate "Canon 4 (of the ABA Code of Professional Responsibility], for example, by successively representing opposing sides of an ongoing dispute," are "paradigmatic candidates for disqualification" since "the attorney is in a position to use the confidences gained through prior conferences with a former client.");

15. As noted in the Court's Order, dated April 12, 2002, ex-shareholders may retain lawyers and are free to pursue claims, if any, they may have.

IV. Conclusion.

For the foregoing reasons, Rendall's motion for reconsideration is granted in part and denied in part. The Court's Order, dated April 12, 2002 [102], is hereby amended to incorporate additional findings of fact and conclusions of law. Within ten business days of this date, Plaintiffs' counsel, Messrs. Milberg, Weiss, Bershad, Hynes & Lerach, LLP, and Messrs. Wechsler, Harwood, Halebian & Feffer, LLP, are directed to cause a copy of this Amended Order of Dismissal to be mailed to those shareholders of Solv-Ex who have written to such counsel or to the Court on or before April 12, 2002. Plaintiffs' counsel is also directed to comply with the remaining notice (publication) provisions of the Order, dated April 12, 2002, within 10 business days of this date.

The clerk is respectfully requested to close this case Nos. 96 Civ. 7575 and 96 Civ. 8744.

APPENDIX D

Letter being sent simultaneously with the Brief to
The President of the United States
George W. Bush

Dated: June _____, 2003

Dear Mr. President,

It is a privilege to acknowledge your heart felt care for the citizens of our Country and its laws derived from a just creator.

Enclosed are three (3) copies of "Petition for Writ of Certiorari" to the Supreme Court of the United States. Contained therein for amicus curiae entrance of support from our government and its agencies and our elected representatives to uphold the Rule of Law where the due process rights of citizens are upheld in the pursuit of life and its attendant property.

Please support this "Petition of Writ of Certiorari" to enable our Government to protect our oil consumption based on environmentally disastrous tailings ponds in Athabasca Canada. We do have an alternative: enormous resources of oil shale which, if properly developed, can meet our oil needs. Attachment A - 21st Century United States War for your consideration.

Respectfully,

John S. Rendall
Petitioner

Letter being sent simultaneously with the Brief to
The Solicitor General of the United States
The Honorable Theodore B. Olson

Dated: June _____, 2003

Dear Mr. Olson,

Enclosed are three (3) copies for "Petition for Writ of Certiorari" to the Supreme Court of the United States.

Attached are letters requesting amicus curiae support of this petition from the branches of the US Government, the Department of Energy, the Securities and Exchange Commission, the US House of Representatives, and the US Senate.

The light of due process is requested to ensure the public's "right to know" about vital issues that directly affects their lives and their property investments. The source of our petroleum needs and the fairness of our markets must not, and should not be controlled by the interests inimical to the well being of our citizens. (Big Oil and short sellers manipulations). The US Congress has passed laws which go directly to the issues involved and should not be overridden just because a citizen is too poor to engage the high priced lawyers of the Southern District of New York. Our Constitutional rights of due process are our safeguard.

Please support this petition.

Respectfully,

John S. Rendall
Petitioner

Attachment B. Memorandum on interest of the US Assistant Attorney General in antitrust issues of this case.

Letter sent simultaneously with the Brief to
The Attorney General of New York
The Honorable Eliot Spitzer

Dated: June _____, 2003

Dear Mr. Spitzer,

Enclosed are three (3) copies for "Petition for Writ of Certiorari" to the Supreme Court of the United States.

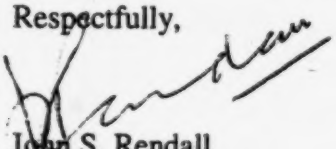
Your determined pursuit of the malfeasance of the "rich and powerful" in manipulating the fairness of the capital markets in New York prompts this request for an amicus curiae support of this petition.

The "light of due process" with the attendant examination of the evidence of the manipulation of the Solv-Ex stock by "Short Sellers", Marty Zweig, et al., will go a long way to assure investors that regulators do not overlook flagrant abuses of the market just because the "rich and powerful" could well face censure. There are untold issues of claims in this class action which need resolution.

Capital markets will work to the public interest (see attached letters) and not only to the tune of major players in the oil industry. Our regulators can help with oversight to ensure a level playing field where the light of day shines on all the players.

Please support this petition.

Respectfully,



John S. Rendall
Petitioner

Attachment C. Outline of Conspiracy in Rendall's Response of October 23, 2002 in NM State Court, CV 96-09869

Letter being sent simultaneously with the Brief to
The Secretary of Energy
The Honorable Spencer Abraham

Dated: June _____, 2003

Dear Mr. Sir,

Enclosed are three (3) copies for "Petition for Writ of Certiorari" to the Supreme Court of the United States.

This is a request for an amicus curiae support of this petition by your department in order to ascertain the "TRUTH" about the disastrous consequences of our import of Canadian oil for the consumers of this country.

The ISSUE is, what did you know? When did you know it? Our duty as a nation is to protect its citizens from "foreseeable" economic penalties of our policies.

The toxic tailings ponds of Big Oil's technology to extract oil from the Athabascan oil Sands of Alberta Canada are legendary. They pose an imminent danger to the delicate ecosystem of the Artic. We should be concerned.

This lawsuit results from the alleged attempted cover-up by Big Oil of the unacceptable environmental consequences of their attempt to dominate the Athabascan oil sands. Solv-Ex Corporation's and Rendall's own technologies (which do not require toxic tailings ponds) were proven at pilot plant scale and permitted at commercial scale to make a difference. The resulting clash in the media with manipulations of governmental agencies and politicians has now resulted in only one side of the saga being used to discredit Rendall, and thereby the techonology.

The other side, Big Oil's alleged manipulations, has yet to see the light of day. The sunshine of "due process" in this case is in the public interest involving the duty of all representatives of the public.

Please convey your interest to the Solicitor General.

Respectfully,

John S. Rendall
Petitioner

Attachment A. 21st Century United States War for Independence - Oil Shale

Attachment D. Implications of Canadian Oil Sands projects for US Policy and Consumers

Letter being sent simultaneously with the Brief to
The Securities Exchange Commission Chairman
The Honorable William Donaldson

Dated: June _____, 2003

Dear Mr. Donaldson,

Enclosed are three (3) copies for "Petition for Writ of Certiorari" to the Supreme Court of the United States.

It is with sadness that I request your support for the "sunshine of due process" on the activities of your agency - an amicus curiae support of this petition.

Your agency in the late nineties pursued only one side of the alleged market manipulation of the Solv-Ex stock. A short sellers letter to the SEC requesting investigation of Solv-Ex Corporation dated January 1996 (attached letter secured in discovery). In the resulting SEC case in New Mexico, Judge Black in May 2000 was persuaded to find Rendall $5,000 by disallowing evidence that the market was manipulated by the agency itself (E-mails). In fact, under the Securities and Exchange Act of 1934, Section 10(b), no evidence of any investor or any specific linkage of Rendall's statements to the price of the stock was offered. Lawyers arguments are not evidence.

This SEC action is on appeal to the Tenth Circuit Court of Appeals as improper Basic v. Levinson, 485 US 124, 231-232, 240 (1988), Issues of materiality, reliance and causation with the whole "mix of information" is needed for adjudication.

Your agency did, in fact, work with Solv-Ex competitors (although denied by your attorneys, but revealed to us through NASDAQ documents). The visit of your officers to Athabasca, the vast toxic tailings ponds and the Solv-Ex plant under construction, makes you an accessory to the cover-up of Big Oil. Is the SEC also responsible for overlooking the effect of these contingent liabilities of the clean-up of toxic tailings on the balance sheet of Big Oil companies traded in the US Stock Market

exchanges (Auditors explanation needed). An inquiry by Senators William Roth, Red Thomson, Jesse Helms, and Trent Lott as to these questions was deftly side stepped by your inquiry against Rendall. (See attached SEC letter).

Now is the opportunity for the public to be shown that your agency does indeed work to protect their investments. Please support this petition.

Respectfully,

John S. Rendall
Petitioner

Attachment:

E. Short seller Cannel letter to SEC starts Solv-Ex investigation (Letters from SEC secured in discovery)

F. Short seller Cannel works with other short sellers re SEC investigation (E-mails and documentary discovery in 96 Civ. 6057).

G. Ex SEC agent Stuart Allen's role in the start of this investigation - a Canadian Conspiracy? The Kroll report.

H. SEC agents stir matters up with Big Oil's agents to discredit Rendall and Solv-Ex as reported in the media.

Letter being sent simultaneously with the Brief to
The House of Representatives - To The Speaker of the House
The Honorable Dennis Hastert

Dated: June _____, 2003

Dear Mr. Sir,

Enclosed are three (3) copies for "Petition for Writ of Certiorari" to the Supreme Court of the United States.

Former Secretary of Interior Lujan, a distinguished Congressman, supported the environmentally acceptable US technology (of Solv-Ex) for the development of oil from the Canadian oil sands to avoid the "toxic tailings ponds" of current technology.

The concurrent Resolution H. Con. Res. 391 of the 100th Congress 2nd Session is attached. The feasibility study in question was produced with financial assistance from the Provincial Government of Alberta Canada. This resulted in permits for a commercial demonstration of the technology at 10,000 barrels/day and substantial financing. Due to circumstances described in the "Petition of Writ Certiorari" to the Supreme Court of the United States", this technology has been discredited/tainted by the actions of Big Oil and agencies of our government.

To add to the "chutzpah" of Big Oil, they now tout US consumption of their tainted supplies of oil from the Athabasca oil sands with a request for our financial support. Attached are articles by a reputable source, the Oil and Gas Advisory Board.

It is in the interest of this body representing the citizens of the United States to support the light of due process to shine on the facts and occurrences surrounding this petition in order to best support what is right.

Please support this petition.

Respectfully,

John S. Rendall
Petitioner

Attachment A. 21st Century United States War for Independence - Oil Shale

Attachment D. Implications of Canadian Oil Sands projects for US Policy and Consumers

Attachment I. H. Con Res. 391 (1998)

Letter being sent simultaneously with the Brief to
The US Senate - The Senator Leader
The Honorable Bill Frist

Dated: June _____, 2003

Dear Mr. Sir,

Enclosed are three (3) copies for "Petition for Writ of Certiorari" to the Supreme Court of the United States.

Oustanding Senators William Roth, Fred Thompson, Jesse Helms, and Trent Lott have all expressed concern to the Securities and Exchange Commission regarding investors concerns of Big Oil's alleged manipulation of the Solv-Ex stock to cover-up their contingent liabilities for the clean-up of enormous toxic tailings. Irrespective of how these liabilities are being accounted for on balance sheets of Big Oil shares traded in US markets, auditors must be trusted by investors for fair opinions. Destruction of US technology which could make a difference to US liabilities needs the light of "due process" of the "Petition for Writ of Certiorari." Attached is correspondence with the SEC.

In fact, senior senators from both parties, Senator Domenici and Senator Bingman, have both received dossiers of evidence showing the conspiracy issues yet to be decided in this case. Their interest has been understandably muted by the SEC actions on only one side of the case which raised credibility issues as to the Solv-Ex technology. (See attached letters). Please take this opportunity to shine the light of "due process" on the effectiveness of our government in protecting its citizens from abuse.

Please support this petition for Writ of Certiorari to ascertain the truth.

Respectfully,

John S. Rendall
Petitioner

Attachment J. Letters to and from Senators to the SEC and Big Oil conspiracy